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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1292

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS SHERMAN
LAURENCE J. COHEN
1200 - 15th Street, N.W.
Washington, D. C. 20005

VICTOR H. HESS
1411 Decatur Street
New Orleans, Louisiana 70116

Attorneys for Petitioner.

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Building and Construction Trades Council of New Orleans, AFL-CIO, respectfully prays that a writ of certiorari issue to review the opinion and decree of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 4, 1967, and December 27, 1967, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (one judge concurring specially and one judge dissenting) is reproduced in Appendix A to this petition, and is re-

ported at 387 F. 2d 79. The Decision and Order of the National Labor Relations Board (R. 28-115)[1], including the majority and dissenting opinions, is reproduced in Appendix B to this petition and is reported at 155 NLRB 319.

Jurisdiction

The opinion of the Court of Appeals was entered on December 4, 1967, and the decree on December 27, 1967. On February 20, 1968, Mr. Justice Black entered an Order extending the time for filing a petition for a writ of certiorari until April 4, 1968. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Question Presented

Whether lawful primary picketing of a construction site by a union, in furtherance of its primary dispute with a general contractor, is converted into a secondary boycott prohibited by Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act when the general contractor establishes reserved gates for the exclusive use of subcontractors and the picketing continues at such gates.

Statute Involved

This case involves Sections 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 et seq.). This section is reprinted in Appendix C hereto.

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[1] References to Volume I of the Transcript of Record printed pursuant to Rule 38 of the Court below (and designated in the same manner in this Court) are designated by the appropriate page number in that Volume, preceded by "R." References to portions of the testimony and exhibits printed as the joint appendix below (and designated in this Court as Transcript of Record, Volume II) are designated by the appropriate page numbers in the joint appendix, preceded by "App."

Statement of the Case

A. *Facts of the Dispute.*

The site of the dispute was a project for expanding the filtration plant of the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana (App. 3). Markwell, a Tennessee corporation with its principal office and place of business in the State of Tennessee, was selected as general contractor for the project (App. 7, 37).

Markwell decided to perform most of the work on the project with its own employees and to subcontract the remainder of the work for which it held the contract with the owner (App. 46, 50, 56). The functions Markwell intended to perform included excavation, concrete work, placement of iron and structural steel, process piping and mechanical work—comprising approximately eighty per cent of the total job (App. 50, 56). Subcontracts were let by Markwell to Binnings Construction Company, Inc. ("Binnings") for pile-driving work totaling $54,000 (App. 30), and Walter J. Barnes Electrical Company ("Barnes"), for electrical work totaling $226,000 (App. 23).

Notwithstanding these subcontracts, full responsibility for the satisfactory completion of the project rested with Markwell (App. 54). Markwell's project engineer and superintendent were to work closely with the subcontractors to insure that Markwell's commitment to the owner was performed in compliance with project specifications (App. 51, 53). On the job, Markwell and its subcontractors worked "together in concert with one another" (App. 28, 29, 52).

Markwell's operations could not go forward until the electrical work and pile-driving to be done by Barnes and Binnings were completed. When Barnes could not perform his electrical work, Markwell's superintendent found "it was holding him up" (App. 26). When Binnings was unable to complete the pile-driving work, Markwell's own em-

ployees stepped in and performed this function, using Binnings' own equipment (App. 31, 44).

Both Barnes and Binnings employed members of AFL-CIO craft unions affiliated with the New Orleans Building and Construction Trades Council (hereinafter, the "Council" (App. 9). Markwell's own employees worked under a contract between the company and a local of District 50 of the United Mine Workers of America, a labor organization not affiliated with the Council (App. 16). It appears that the wage scales provided for in the District 50 contract (R. 45, 60-62) were lower than the wage rates of the unions affiliated with the Council then prevailing in the New Orleans area for comparable work (App. 16-18, 77).

On October 17, 1963, Council representatives placed a single picket at one of the four gates in the chain link fence enclosing the filtration expansion project (App. 4, 37). He carried a sign with the following legend:

> "The wage rates on this job should be as posted: "Workers $4.05 per hour; boilermakers $4.00 per hour; bricklayers $4.00 per hour; carpenters, $3.62; cement masons $3.45; electricians $4.25; elevator constructors $3.96; glassworkers $3.52½; hod carriers $2.18; iron workers $3.52½; laborers $2.101 [*sic*]; lathers $3.56; millwrights $3.90½; painters $3.17; pile drivers $3.62; plasterers $3.58½; pipe fitters $4.05; plumbers $4.05; rod men $3.67; roofers $3.55; sheet metal workers $3.63½; tile layers $3.45; operating engineers $3.77½.
>
> "Markwell & Hartz, general contractors, does not have a signed agreement with the Bldg. and Const. Trades Council of New Orleans. AFL-CIO." (App. 77; see also App. 65)

When the picket appeared, Barnes' and Binnings' employees walked off the job (App. 24, 31). Markwell there-

upon took action[2] to readjust the flow of traffic through the various gates on the job (App. 38, 43, 45, 56, 68, 69):

On October 23, 1963, Markwell posted signs on all but one of the entrances to the job site stating that the gates involved had been reserved and set aside for employees of Markwell's subcontractors, suppliers, and motor freight lines, and that Markwell's own employees were not to use them (App. 38).[3] On the remaining gate, a sign was posted stating that it was to be used by Markwell employees only (App. 38). Some of these gate signs were amended on November 14, 1963, to bar Markwell suppliers' and carriers' employees from the gates being used by subcontractors' employees (App. 45), although the signs on other gates were not correspondingly adjusted at that time (App. 46). It was not until November 16, 1963, that carriers and suppliers were barred from all gates being used by subcontractors' employees (App. 45, 68), and it was not until December 6, 1963, that Markwell had brought all the various gates and signs into accord with each other (App. 69). On that date, a single gate had been marked as reserved for use by employees of Markwell and his job site suppliers and truck lines (App. 69).

While Binnings and Barnes employees refused to work on the filtration plant expansion project during the period that picketing was underway, at no time did the picketing or any other union action affect Barnes or Binnings operations other than those related to the Markwell subcontracts. Thus, when Binnings had to remove some equipment

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[2] While the premises upon which the construction work was going forward was owned by Jefferson Parish (App. 54), no question was raised as to Markwell's authority to "post" the various job site entrances in any manner it thought appropriate.

[3] On October 23, 1963, at the same time that the first adjustment in the gate signs was made, Markwell withdrew its employees from the job for a 24-hour period "in an effort to expedite pile-driving work on this project * * *" (App. 42, 43).

on the Markwell job for use on another project, the removal went forward without delay notwithstanding the picketing (App. 31). Similarily Barnes' employees worked on the Water Works premises on an electrical job not related to the Markwell contract while the picket was posted (App. 27).

B. *The Board's Decision*

The Board majority held that the picketing engaged in by the Council at the subcontractors' gates was lawful primary action prior to November 16, as it was on that date that the subcontractors' gates were first marked to preclude use by persons making deliveries to Markwell (R. 92-93, fn. 23). It recognized that a "common situs" problem was presented by the events at the subcontractors' gates prior to November 16 but rationalized the result as "respecting the traditional right of labor organizations to appeal to such delivery men" (R. 93).

The Board majority held that the picketing became a secondary boycott from and after November 16 on the basis of the *Moore Dry Dock*[4] rules. In response to the contention that the picketing continued to be primary after November 16 because the work of the subcontractors was related to the normal operations of Markwell under the *General Electric* and *Carrier* decisions of this Court,[5] the majority ruled that those decisions were "inapposite."[6] No reasons were given for this conclusion based on fact or

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[4] *Sailors Union of the Pacific*, 92 NLRB 547.

[5] *Local 761, Electrical Workers* v. *NLRB (General Electric)*, 366 U.S. 667 (1961); *United Steelworkers* v. *NLRB (Carrier)*, 376 U.S. 492 (1964).

[6] The refusal by the Board majority to apply the *General Electric* and *Carrier* related work tests in the instant case has been widely criticized in legal commentaries. See 65 Mich. L. Rev. 212, at 217, 218-19 (1966); 44 Texas L. Rev. 794, 795-97 (1966); 20 Sw. L. J. 815, 830 (1966); 54 Geo. L. J. 962, 975 (1966).

the statute except for the statement that the Board had "traditionally" distinguished between picketing at the premises of a "struck manufacturer" and picketing at a so-called "common situs" as here where "the primary employer was but one of several employers operating on premises owned and operated by a third party, the Jefferson Parish Water Works" (R. 86).

In a second *Markwell and Hartz* case, *Nashville Building and Construction Trades Council,* 164 NLRB No. 50, 65 LRRM 1149, enfd. 383 F. 2d 562 (6th Cir. 1967), the Board made it explicit that its previous decision in the New Orleans case was based on the proposition that the legality of picketing at a common situs in the construction industry is not to be determined by the "special guidelines" laid down by the Supreme Court in *General Electric.* The majority in this case rejected the position of the dissenters that application of *General Electric* and *Carrier* would not require a reversal of the *Denver Building and Construction Trades Council* case[7] by stating that the theory of the dissent "if logically extended" would require such reversal.

The two dissenting members took sharp exception to the holding of the majority, stating in part as follows:

> "As we believe, for reason stated below, that the Court in those decisions [*General Electric* and *Carrier*] applied principles of general application, we dissent from the majority's conclusion that the tests announced in *General Electric* for determining whether appeals to employees of neutral contractors constitute legitimate primary activity are not applicable to the building and construction industry." (R. 100)

The dissenters further objected to the effect of the distinction drawn by the majority between the construction

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[7] *NLRB v. Denver Building and Trades Council,* 341 U.S. 675.

industry and all others, which would permit an employer in the former to designate or limit the places of primary activity against him, while employers in other industries would not be able to do so. Finally, the dissenters rejected the conclusion of the majority that this Court's decision in *Denver* precluded application of the *General Electric* related work test to this case, particularly where, as here, the dispute was with the general contractor rather than any of the subcontractors. Applying the related work test to the facts presented, the dissenters found that the work of the subcontractors, Binnings and Barnes, was related to Markwell's work on the job and its responsibility to complete the entire project, within the meaning of *General Electric.*

C. *The Court of Appeals' Decision.*

By a two to one vote, with three separate opinions, the Court of Appeals granted enforcement of the Board's order. Judge Connally, writing the Court's opinion, found —contrary to the view of the Board majority—that the related work test in *General Electric* and *Carrier* does apply to construction industry picketing. Ignoring the difference between "relatedness of work" and relationship of legal entities, however, he held that this Court's ruling in *Denver,* which was based on the independent legal status of the subcontractor, required affirmance of the Board's order. The specially concurring opinion of Judge Rives disagreed with Judge Connally on the point of work relationship and stated that "It seems to me that the work of the subcontractors Binning and Barnes was 'related to the normal operation' of the general contractor Markwell and Hartz, Inc. (M & H)." (App. A, *infra,* p. 9a) He concurred in the result, however, because he accepted the Board majority view that the related work test does not apply to common situs picketing in the construction industry.

The dissenting opinion of Judge Wisdom agreed with the

position of the Board dissenters that this Court did not intend in *General Electric* to distinguish between industries in the application of the related work test; rather, he found the test is one of general application to all industries, and would have remanded the case to the Board to decide whether the work of Binnings and Barnes was related to that of Markwell & Hartz.

Judge Wisdom considered the relationship between *Denver* and *General Electric* and *Carrier* as follows:

> "The Board assumes that if the related-work standard is applied to common construction situs, *General Electric* must be considered as having overruled *Denver sub silentio*. In *Denver*, however, the Court focused on the point that contractors and subcontractors on a construction project are not *necessarily* so interconnected that they should all be regarded as one entity. The Court did not hold that as a matter of law all independent contractors on a common situs must be considered as neutrals. In *General Electric* the Court accepted the *Denver* holding that subcontractors are separate legal entities and accepted the principle that the union may appeal to employees of a secondary employer. The Court then focused on the criteria for determining when and how the union may reach the employees of the secondary employer. The touchstone furnished by *Carrier* as well as by *General Electric* is relatedness of work. To the extent that the conclusions in *Denver* were arrived at independent of any consideration of relatedness, those conclusions must be considered as modified by application of the relatedness standard set down in *General Electric*. Here, therefore, the Board should have made a finding on the issue of relatedness. An unlawful object under Section 8(b)(4) cannot be inferred simply from the fact that the union has picketed at a gate reserved for the subcontractors' employees." (App. A, *infra*, p. 20a)

What emerges from the decision of the Court of Appeals is thus: (1) a lack of a majority rationale for its enforcement of the Board's Order; (2) two members of the Court actually agreeing with the Board dissenters that the related work test *is* applicable to construction industry picketing [8]; and (3) a serious disagreement between the three members of the Court, as existed between the five members of the Board, as to the interpretation to be placed upon this Court's decisions in *General Electric* and *Carrier* with respect to construction site picketing, as well as to the relationship between those decisions and the earlier ruling in *Denver*.

Reasons for Granting the Writ

I. Both the Court of Appeals and the Board have decided an important question of Federal law in a way in conflict with applicable decisions of this Court.

A. *General Electric and Carrier*

The basic issue presented by this petition is the meaning and scope of this Court's decision in *General Electric* and *Carrier, supra*. It is respectfully submitted that the combination of opinions which constitutes the majority decision of the Court below did not correctly apply or construe these decisions.

Judge Connally found no reason to limit *General Electric* and *Carrier* to the manufacturing industry and properly stated that:

> "The question posed here is whether the work of subcontractors Binnings and Barnes was 'related to the normal operation' of Markwell and Hartz (as, for ex-

[8] The U. S. Court of Appeals for the Sixth Circuit, in the *Nashville* case, *supra*, took the view that *General Electric* and *Carrier* do not apply to the construction industry. 383 F. 2d 562, 566. There was no explication of the Court's position on this point.

> ample, ordinary maintenance as in *General Electric*), in which event the picketing is primary; or whether it is unrelated to the normal operations (as 'of a capital improvement nature')." (App. A, *infra*, p. 6a)

He did not examine the work operations which Judge Rives in his special concurring opinion had determined to be "related," but rested his opinion on the legal relationship between the subcontractors and the general contractors. Obviously, such business relationships were not the key to the rulings in *General Electric* and *Carrier*. The building and construction trades contractors were separate and independent from General Electric Company. The railroad company was separate and independent from Carrier Company. It would thus appear that Judge Connally's opinion did not actually apply the "related work" tests of *General Electric* and *Carrier* to the instant case.

In his concurring opinion, Judge Rives agreed with the Board majority that there was a distinction between picketing at the premises of the primary employer and picketing at a common situs where two or more employers are performing separate tasks. He endeavored to find recognition of this distinction by this Court in its decisions in *General Electric* (citing 366 U.S. at 676-679) and *Carrier* (citing 376 U.S. at 497), adding that the latter continued to recognize the importance of the location of the picketing.

Petitioner submits that nothing in the portions of the *General Electric* and *Carrier* decisions relied upon by Judge Rives supports his conclusion. Indeed, in *Carrier*, the full statement referred to was as follows:

> "The location of the picketing, though important, *was not deemed of decisive significance;* picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate

> gate picketing depended upon the type of work being done by the employees who used that gate; . . ." 376 U.S. at 497 (Emphasis added.)

Nor does this Court's tracing of the history of the *Moore Dry Dock* doctrine, in *General Electric,* at 366 U.S. 676-679, indicate the claimed recognition of Judge Rives' distinction. It is to be noted, for example, that this Court described "common situs" cases as those "situations where two employers were performing separate tasks on common premises." (366 U.S. at 676-77). No distinction was drawn between such situations which occurred at the premises of the struck employer and those which did not. Further, with respect to the *Moore Dry Dock* case itself, Petitioner submits that this Court approved that doctrine as an illustration of the proposition that picketing could not be legally directed at employees of a secondary employer [Moore Dry Dock] whose work operations [ship conversion] at its premises [dry dock] were not related to the everyday operations [sailing a vessel] of the primary employer [Samsoc]. There is no indication in *General Electric* or *Carrier* that this result depended on the application of such descriptive terminology as "primary situs" or "common situs." On the contrary, the result flows from the lack of relationship between the work operations of the secondary employer and the everyday operations of the primary employer. In short, Judge Rives has misread the effect of this Court's opinion in *General Electric,* which is that the *Moore Dry Dock* rules are to be utilized when the work of the employers present at the common situs is unrelated, but that it has no application where their work is related:

> "Where the work done by the secondary employees is *unrelated* to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at

property owned by the struck employer. The application of the Dry Dock tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the 'dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' *N.L.R.B.*, v. *Denver Building and Construction Trades Council, supra* (341 U.S. at 692)." 366 U.S. at 679. (Emphasis added.)

A majority of the Board, whose decision was enforced by the Court of Appeals, similarly misconstrued and misapplied the *General Electric* and *Carrier* decisions in their attempt to limit the effect of those decisions to picketing which takes place at the premises of a manufacturer who is the primary employer in the labor dispute involved. Such a dispute, said the Board majority, does not involve a "common situs."

The principal basis on which the Board majority rested its primary situs-common situs distinction was its view that this Court had made an "'observation that the *General Electric* case did not present a common situs situation to which the *Moore Dry Dock* rule should apply." (R. 91) Petitioner submits that reference to the page of this Court's opinion in *Carrier* upon which the majority relies (376 U.S. at 497), to the succeeding pages of that opinion, to this Court's decision in *General Electric*, and to the Board's brief submitted to this Court in *General Electric*, reveal plainly that the Board majority has incorrectly interpreted this Court's decisions. This Court did not hold the *Moore Dry Dock* rules inapplicable in *General Electric* because a common situs situation was not presented; rather, the rules were held inapplicable because related work was involved.

The Board's position in *General Electric*, as stated in its

brief to this Court, did *not* contend that the *General Electric* case did not "present a common situs situation." On the contrary, the brief for the Board *equated* the common situs situation in the building and construction industry with the common situs situation in the *General Electric* case. The following statements in the Board's brief in the *General Electric* case set forth the facts which are a matter of common knowledge:

> "The situation here [GE] is substantially similar to that in *Denver* and *Electrical Workers,* pp. 17-18 *supra.* There, as here, the same premises were the regular work site for a number of different employers and their employees. . . .
>
> "*Denver* and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park. Petitioner says (Br. 57-58; see, also, *Amici* Br. 23) that in the building and construction situations the various contractors on the project are not doing work for each other but for some third person, whereas here the contractors are doing work directly for the primary employer, General Electric. But, considering the interdependence of the various crafts on the typical construction project, it is highly unrealistic to say that the work of one does not benefit or involve the others. For example, the electrical subcontractor may not be able to wire the building unless the carpenter subcontractor puts in studs; if the union has a dispute with the former and, in furtherance of its cause, strikes the latter, there has been an interruption of work which directly involves the primary employer to the same extent as here. The difference is that here the disruption has occurred on premises owned by the primary employer

whereas in the example given the premises are owned by a third party—a distinction which the union concedes is not material (Br. 91-92). Indeed, as the PBM case, discussed *supra*, p. 26, illustrates, where the primary dispute is with the general contractor who owns the land, and the union strikes his subcontractors, a situation identical to that presented here may arise in the building and construction situation." NLRB br., pp. 34-35.

Actually, this Court would have sustained the Board's decision holding the picketing unlawful if the factual assumption that the independent building and construction trades contractors were performing new construction work unrelated to the operations of the GE plant had proved true. (Later the Board, on remand, found the work of the independent contractors "related" to the operations of the plant.) In distinguishing the case of picketing of gates used by deliverymen, customers and replacement workers, this Court stated that: "The key to the problem is found in *the type of work* that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale first stated in the present case, only to situations where the independent workers were performing tasks *unconnected* to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the individual limitations on picketing activity respect the balance of conflictng interests that Congress has required the Board to enforce." 366 U.S. at 680. (Emphasis added.) The remand was made to ascertain whether the reserved gate was used by employees of the independent contractors to perform *related* work.

Nowhere in the opinion did this Court take issue with the statement in the Board's brief describing the *General Electric* case as a common situs situation. The crucial legal

distinction was the relationship or lack of relationship of the work operations of the primary and secondary employer at the site of the primary labor dispute; *not* whether the site of the dispute could be described factually as a "common situs." The distinction proposed by the Board in the *General Electric* case between transitory appearance of the secondary employer's employees at the primary employer's place of work—as in the case of deliverymen—and their regular presence at such place—as in the *General Electric* case where the secondary building and construction trades employees had been working at the plant for as long as 6 years—was not accepted by this Court.

This Court's rejection of the Board's "primary situs-common situs" distinction is made even clearer by the analysis of its *General Electric* decision, which it set forth in its later decision in *Carrier:*

> "In the General Electric case, because the union's object was to enmesh 'employees of the neutral employers in its dispute' with the primary employer, the Board ordered the union to cease picketing a separate gate used exclusively by employees of certain independent contractors *who had been doing work on the primary premises on a regular and continuous basis for a considerable period of time.* 123 NLRB 1547. In this Court, the Board conceded that when the struck premises are occupied by the primary employer alone, the right of the union to engage in primary activity at it in connection with the primary premises may be given unlimited effect—'all union attempts, by picketing and allied means, to cut off deliveries, pickups, and employment at the primary employer's plant will be regarded as primary and outside the purview of Section 8(b)(4)(A).' But *the Board insisted that the facts presented a common situs problem since the regular work of the contractors was continuously done on*

the primary premises and hence the rules of the Moore Dry Dock case should be applied. The union, on the other hand, argued that no picketing at the primary premises should be considered as secondary activity.

"*The Court accepted the approach neither of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance;* picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice. The order of the NLRB was vacated to permit determination of the case in accordance with the proper test.

"It seems clear that *the rejection of the Board's position in General Electric* leaves no room for the even narrower approach of the Court of Appeals in this case, which is that the picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees." 376 U.S. at 497-498. (Emphasis added.)

It is respectfully submitted that the proposition which emerges from the *General Electric* and *Carrier* decisions is that Section 8(b)(4)(i) and (ii)(B) establishes a rule of law which allows the union to picket a primary employer at the premises he occupies and to include within the scope of such picketing the employees of other employers at such

premises *if* the operations of such other employers are related to the operations of the primary employer. The primary employer cannot avoid the rule by establishing a reserved gate for the entrance of employees of other employers at the premises of the primary employer, whether such employees are engaged in the transitory function of delivery or a regular and continuous function such as conventional maintenance.[9]

The central error of the Board's majority opinion is well described by the two dissenting members as follows:

> "In our view, the majority has inferred that Respondent's picketing was for an unlawful object simply from the fact that the reserved gates were used only by secondary employees, *without inquiry* into the question of whether the appeals to such employees, were, in the circumstances of this case, permissible primary activity, an inquiry which we believe is required by the Supreme Court's decisions in *General Electric* and *Carrier Corp.*" R. 100. (Emphasis added.)

As stated by Judge Wisdom, dissenting below: "There is nothing in *General Electric* or *Carrier* to suggest that

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[9] The Court also ruled that primary picketing which properly includes employees of secondary employers at the situs cannot be converted into secondary picketing by device. Thus, the removal by the employer of all the primary employees from the premises is not effective to convert the allowable picketing into prohibited secondary activity. *Local 618, Automotive Employees* v. *NLRB (Site Oil)*, 249 F. 2d 332 (8th Cir. 1957); *Seafarers' Union* v. *NLRB (Salt Dome)*, 265 F. 2d 585 (DC Cir. 1959). The establishment of a separate gate for deliveries cannot accomplish such an object. *General Electric*, 366 U.S. at 680. Nor can this result be achieved through the medium of a separate gate for employees of independent contractors engaged in the performance of "related" work. See *Kaynard* v. *Local 282, Teamsters*, 200 F. Supp. 505 (DCED NY, 1962). Yet this last device is exactly what the Board majority opinion seeks to validate.

Note in this regard the Board majority's variant treatment of the picketing at October 23, during the period prior to November 16, and after November 16, each of which reflect the illustrations listed in this footnote.

the construction industry should be treated differently from any other industry [with respect to the application of the tests of those cases]." (App. A, at p. 21a, *infra.*) The direct answer to the Board's arbitrary distinction between manufacturing and construction is to be found in its own factual representations to this Court in *General Electric* that the situation in *General Electric* "is substantially similar" to that of a building and construction project (NLRB br., p. 34). In the Board's language:

> "*There* [the building and construction project], *as here,* [G.E. Appliance Park] *the same premises were the regular work site for a number of different employers and employees.*
>
> * * *
>
> "*Denver* and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park." *Ibid.* (Emphasis added.)[10]

These statements of the Board raise serious questions as to the validity of its claim that the instant decision was required by its "traditional" views "over the years" (R. 86, 87). It is respectfully submitted that, even if the claim is factually correct, recourse to the *ipse dixit* of Board "traditions" is no substitute for proper construction and application of the statute. In this regard it may be noted that this Court struck down the Board's erroneous interpretation of Section 10(k) of the Act notwithstanding the Board's practice of fourteen years in misapplying that

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[10] Therefore, for the reasons once acknowledged before this Court, the Board may not now allow Markwell and Hartz to insulate itself from picketing throughout the construction site by subcontracting some of its work and posting signs at various gates, any more than General Electric could have insulated itself by subcontracting the wiring of its refrigerators to an independent contractor on its own premises and restricting the entry of its subcontractor's employees and suppliers to a single gate.

section of the Act. *NLRB* v. *Radio & Television Broadcast Engineers, (C.B.S.)*, 364 U.S. 573 (1961).

B. *Denver.*

The Board majority sought to avoid the clear rule of *General Electric* by stating that its acceptance of the dissent, "if logically extended," would mean that *NLRB* v. *Denver Building and Construction Trades Council,* 341 U.S. 675 (1951), had been overruled *sub silentio.* It is respectfully submitted that a reversal of the Board's decision and order in this case would not involve a reversal of the decision in *Denver.*

The issues in the *Denver* case are different from the issues in the instant case. In *Denver,* a general contractor for the construction of a building let a sub-contract for electrical work to Gould & Preisner, a nonunion employer. The union thereupon picketed the project with a sign stating: "This Job Unfair to Denver Building and Construction Trades Council," and all employees of employers other than Gould & Preisner left the job. The general contractor then removed Gould & Preisner so that the union employees would return to work. It is to be noted that there were no separate gates involved in the case.

The Supreme Court examined the record with respect to the Board's finding:

> "That *an* object, if not the only object of what transpired with respect to . . . Doose and Lintner [union general contractor] was to force or require them to cease doing business with Gould & Preisner [non-union electrical subcontractor] seems scarcely open to question, in view of all of the facts. And it is clear at least as to Doose and Lintner, that that purpose was achieved." 82 NLRB, at 121. (Emphasis added.)

The Court contrasted *Rice Milling,* where the picketing union "sought merely to obtain its own recognition" by

the primary employer who operated the mill. It deemed the union appeal to the two employees of the secondary employer (an independent company which was a customer for the mill's products), who drove a truck to the mill, as included within the permissible limits of a "primary strike."

In reviewing the record in *Denver* the Court conceded that:

> "If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance in their [*i.e.*, Union] contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own non-union employees, it could have replaced them with union men and thus disposed of the dispute. However, the existence of the Gould & Preisner subcontract presented a materially different situation. The non-union employees were employees of Gould & Preisner. The *only way* that respondent could attain *their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract.* The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract. . . . It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract." 341 U.S. at 688-689. (Emphasis added.)

In the instant case, the objective of the picketing union was to raise the wages of the general contractor's employees to the area standards.[11]

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[11] "Area standards" picketing has been held to be lawful primary activity. *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321 (1962).

Actually, the Board majority recognized that the union was engaged in a primary labor dispute in its statement of the question in the case as follows:

> ". . . we are asked to decide whether a union, in furtherance of a *primary dispute* with a general contractor in the construction industry, may lawfully engage in jobsite picketing at gates reserved and set apart for exclusive use of neutral subcontractors." R. 84. (Emphasis added.)

The Board majority acted upon this view when it ruled that the picketing on October 23, when Markwell withdrew all its employees for a 24-hour period, "did not evidence a departure from what at that time constituted lawful primary action." (R 93, fn. 22).[12]

Even more significantly, the Board majority held lawful the Council's picketing of the reserved gates prior to November 16 because during such period these gates were reserved not only for subcontractor's employees but also for employees of suppliers and carriers. The majority avoided the *General Electric* and *Carrier* rule of law which clearly required this result, and sought its justification in its undefined authority to "balance . . . competing interests."

A fortiori, the Board could not have held the picketing unlawful prior to the establishment of any reserved gates. In this material respect, the instant case differs from

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[12] Markwell's petition to review the Board's order in this case was based on the Board's "refusing to sustain in all respects the complaint of the General Counsel predicated on the charge filed by petitioner, whereby petitioner is aggrieved" (R. 8). Since the complaint of the General Counsel alleged violations dating from "on or about October 23, 1963," (R. 28), whereas the Board found violations only after November 16, 1963 (R. 92-93, f.n. 22), it is assumed that the Board's finding the picketing legal prior to November 16 was the basis for Markwell's alleged aggrievement. The Court below affirmed this part of the Board's order.

Denver, where the picketing was held unlawful even though there were no reserved gates.

The legal question in the instant case thus narrows itself down to the issue of whether primary picketing of a general contractor at a "common situs", which is lawful even when maintained at gates reserved for both carriers and subcontractors (or *a fortiori* at gates reserved for carriers alone), becomes unlawful secondary picketing when the general contractor reserves the gates solely for subcontractors doing work related to the normal operations of the general contractor.

The Board majority's refusal to equate the legal effect of the "related" work of the subcontractor's employees with the "related" work of the carriers' employees flies straight in the face of the holding of this Court in *General Electric* and the following language in *Carrier:*

> "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission *is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.*" 376 U.S. at 499. (Emphasis added.)

Certainly there is nothing in the 1951 decision of this Court in *Denver* which requires or authorizes the Board's erroneous reading of the *General Electric* (1961) and *Carrier* (1964) decisions for the purpose of preserving its discriminatory "common situs" policy.[13]

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[13] 65 Mich. L. Rev. 212, at 219; 20 Sw. L. J. 815, at 835; 54 Geo. L. J. 962, at 976.

In this connection, it should be noted that the Board majority recognized that, in accordance with its terminology, "a common situs problem is presented" where a gate is reserved for employees of subcontractors and deliverymen (R. 92-93, fn. 22). The dilemma thus created by the majority's approach was resolved by it, as pointed out above, by utilizing the so-called "balancing" power of the Board. It is respectfully submitted that, although the legal interpretations of an agency administering a statute are entitled to weight, there is nothing in *General Electric* and *Carrier* which recognizes a roving commission in the Board to "balance" as the method for distinguishing between lawful primary picketing and unlawful secondary picketing.

II. The question presented by the Petition is one of major significance in the administration of the National Labor Relations Act and affects fundamental rights of organized labor in the building and construction industry.

The issue presented is significant because, simply stated, what results from the *Markwell & Hartz* doctrine of the Board majority, enforced by the Court below, is the serious and unwarranted dimunition of the right of building and construction trades unions and their 3½ million members to engage in primary picketing. This Court has taken special note of the Congressional intention to safeguard the fundamental right of primary picketing. (See *Carrier*, 376 U.S. at 499; *supra* at page 23.)

Legal commentators have noted that the arbitrary discrimination against building and construction trades unions resulting from the *Markwell & Hartz* doctrine will have the practical effect of extinguishing their right to engage in primary picketing:

> "The Board's decision in the instant case results in more rigid standards for common-situs picketing in

the construction industry than for reserved-gate picketing in the manufacturing industry. The same picketing that may be lawful at a construction site where there is no reserved gate, becomes unlawful when conducted at a reserved gate. Thus any general contractor wishing to lessen the effects of construction-site picketing need only set up separate gates for use by the neutral subcontractors. This distinction seems difficult to justify since the adverse effects of reserved-gate picketing on neutral secondary employers are the same whether experienced at a construction site or manufacturing plant; the union employees of the secondary employer are likely to honor the picket line in both instances. 44 Texas L. Rev. 794, 798.

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"By setting aside reserved gates, contractors at a construction site will be able to render ineffective almost any union picketing—a luxury not afforded employers in the manufacturing industry." 54 Geo. L. J. 962, at 976.

• • •

"The *Markwell & Hartz* decision seems to stifle completely any union attempt to picket at a construction site. Any informed employer will know to utilize separate gates to indicate a violation of the *Dry Dock* rules. . . . *Markwell & Hartz* is the most stringent measure ever taken to control union picketing at a construction site, surpassing even *Washington Coca Cola.*" 20 Sw. L. J. 815, 833.

The significance of this issue in the administration of the Act may be ascertained from the high percentage of § 8(b)(4)(B) cases which arise in the building and con-

struction industry. Thus, of a total of 1,206 "CC" [14] cases received by the Board in fiscal year 1966, 653 were in the construction industry. The next largest group was for all manufacturing industries, and even though these combined industries employ many more millions of employees than are engaged in the construction industry, only 255 such cases arose in that group.

Thus, the importance of the issue presented, the conflict between the ruling of the majority of the Board and the Court below with applicable decisions of this Court, and the deep division within both the Federal Agency empowered to administer the statute and the reviewing Court below concerning the standards to be applied to picketing of reserved gates at construction sites, are compelling reasons for the granting of review by this Court.

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[14] Thirty-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1966, U. S. Gov't. Printing Office, 1967, Appendix A, Table 5, pp. 192-193.

"CC" cases are those arising under Sections 8(b)(4)(A), (B) and (C) of the Act, of which, in fiscal 1966, 8(b)(4)(B) charges—the section here involved—represented over 80 per cent of such cases. Board Annual Report, 1966, *supra*, at Appendix A, Table 2, p. 186.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Louis Sherman
Laurence J. Cohen
1200 - 15th Street, N.W.
Washington, D. C. 20005

Victor H. Hess
1411 Decatur Street
New Orleans, Louisiana 70116

Attorneys for Petitioner.

Of Counsel:

Sherman and Dunn
Washington, D. C.

Jackson & Hess
New Orleans, Louisiana

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23083

MARKWELL AND HARTZ, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 23214

NATIONAL LABOR RELATIONS BOARD
Petitioner,

versus

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO,
Respondent.

Petitions for Review and Enforcement of an Order of the National Labor Relations Board.
(Louisiana Case)

(December 4, 1967.)

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge

CONNALLY, District Judge: The above styled and related actions have been consolidated. Both result from picketing by the Building and Construction Trades Council of New Orleans, AFL-CIO ("Council" or "Trades Council" hereafter), of a common situs construction project, which the National Labor Relations Board has held to constitute a secondary boycott, violative of Section 8(b)(4)(B) of the Labor-Management Relations Act [29 U.S.C.A. 158(b)(4)(B)]. In the earlier appeal (No. 23083) by the employer with whom the dispute existed, we affirm [1] the findings of the Board that the employer is not entitled to further relief. In the latter (No. 23214), we likewise agree with the Board, and order enforcement.

Briefly stated, the facts are these. In September of 1963 Markwell and Hartz, Inc. was the general contractor for the expansion of a filtration plant at the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana. Prior to beginning construction, Markwell and Hartz entered into an agreement with District 50 of the United Mine Workers of America whereby District 50 became the recognized bargaining agent for Markwell and Hartz's employees. Also prior to beginning construction, Markwell and Hartz contracted with two subcontractors, Binnings Construction Company, Inc. ("Binnings") and Walter J. Barnes Electrical Company ("Barnes") to perform the pile driving and electrical work, respectively. It performed the remainder of the work, consisting of approximately 80%, itself. Employees of both Binnings and Barnes were represented by the respondent Trades Council.

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[1] This appeal has not been seriously urged.

Immediately a dispute arose between Markwell and Hartz and the Trades Council. The latter sought to become the bargaining representative of the Markwell and Hartz employees. On October 17, 1963, the Council began to picket the project.

Shortly after the picket line appeared, Markwell and Hartz endeavored to insulate its subcontractors Binnings and Barnes, who were neutrals in the labor controversy, from the effects of the picketing. It did so by establishing four separate gates, three for the exclusive use of the subcontractors, their employees and suppliers; the fourth for the exclusive use of its own employees and suppliers. Despite the clear delineation by signs distinguishing between the subcontractors' gates and that for the use of the general contractor, the Council continued to picket all gates until enjoined by the District Court for the Eastern District of Louisiana on January 15, 1964. As a result of the picketing, the employees of Binnings and of Barnes refused to work on the project.

Acting on a complaint lodged by Markwell and Hartz, the National Labor Relations Board entered an order generally favorable to Markwell and Hartz, declaring that after November 16, 1963 (at which time the gates had been clearly marked) the Council had engaged in an unfair labor practice violative of Sections 8(b)(4)(i) and (ii)(b) of the Act. The Board found that one of the purposes of the picketing of the subcontractors' gates was to cause Binnings and Barnes (the neutrals) to cease doing business with Markwell and Hartz. The Board issued a typical cease and desist order.

The case is before this Court primarily on the Board's petition to enforce its order, while Markwell and Hartz seeks additional findings in its favor.

At the outset, it should be noted that the dispute that gave rise to the picketing was not between Markwell and Hartz and its employees. Nor was the dispute, in practical effect, between Markwell and Hartz and the Trades Council. The real adversaries were District 50 of the United Mine Workers and the Trades Council, the latter being the also-ran in the race to see who would be the bargaining representative of Markwell and Hartz's employees. District 50 has appeared as *amicus curiae,* urging enforcement of the Board's order. Hence the dispute was jurisdictional in nature.

It is the Trades Council's position that the facts of this case bring it within the ambit of *Local 761, IUE, etc. v. NLRB,* 366 U. S. 667 (1961), popularly known as the *General Electric* case. The Trades Council further argues that the *General Electric* case and the *Carrier* case [*United Steelworkers v. NLRB,* 376 U. S. 492 (1964)], have, *sub silentio,* overruled the Supreme Court's decision in *NLRB v. Denver Building & Construction Trades Council,* 341 U. S. 675 (1951). We do not agree with this position.

Attempts to distinguish between protected primary picketing and the forbidden secondary activity—particularly at a common situs where employees of the primary and of the secondary employers work side by side—have been the source of much litigation both before the Board and in the Courts.[2] Much of the uncertaintly which formerly shrouded this question has been clarified, we think, by *General Electric* wherein the question and the various authorities are reviewed at length, and by *Carrier* which follows and approves *General Electric.* These are the cases primarily relied upon by the Trades Council.

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[2] See, e.g., United Brotherhood of Carpenters, 81 N.L.R.B. 802; United Electrical Workers (Ryan Const. Corp.), 85 N.L.R.B. 417; Retail Fruit & Vegetable Clerks (Crystal Palace Mkt.), 116 N.L.R.B. 856; Superior Derrick Corp. v. N.L.R.B. 273 F.2d 891 (5th Cir. 1960).

In *General Electric,* that company was the primary employer engaged in a dispute with its own employees at its own plant. A number of subcontractors were performing various services for General Electric at the plant site. Separate gates were clearly designated for the exclusive use of these subcontractors. The work performed by the subcontractors was of different types, the distinction being emphasized by the court as "routine maintenance service" —which at times was performed by General Electric's own employees, and occasionally subcontracted out—as distinguished from "specialized work of a capital improvement nature" (366 U. S. at p. 669). There Mr. Justice Frankfurter, speaking for the Court, without dissent, rejected the argument of the Union that all picketing at the plant of the struck employer should be considered primary, stating:

> "In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in *Rice Milling,* in which we indicated that the location of the picketing at the primary employer's premises was 'not necessarily conclusive' of its legality. 341 U. S. at 671. Where the work done by the secondary employee is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer. The application of the *Dry Dock* tests to limit the picketing effects of the employees of the employer against whom the dispute is directed carries out the 'dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' *Labor Board v.*

Denver Building Council, supra, at 692." 366 U. S. at p. 679.

And further, the Court stated:

". . . The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings." Id. at p. 680.

Three years later in *Carrier* the Court, again without dissent, rejected the theory that ownership or control of the site of the picketing was controlling. There Carrier was engaged in a dispute with its employees, at its own plant. The picketing in question took place at a railroad spur track, owned by the railroad and used exclusively by the railroad and its employees, but located immediately adjacent to Carrier's plant and used for the delivery of supplies and removal of the manufactured products of Carrier. Approving and reaffirming the test of *General Electric,* the Court in *Carrier* held that the ownership of the railroad spur was immaterial, and that it was, in fact, no more than another gate to the Carrier plant; hence the picketing at such gate to inform the railroad and its employees who were suppliers of Carrier of the existence of the dispute was primary and protected activity.

Thus the question posed here is whether the work of subcontractors Binnings and Barnes was "related to the normal operations" of Markwell and Hartz (as, for example, ordinary maintenance as in *General Electric*), in which event the picketing is primary; or whether it is unrelated to the normal operations (as "of a capital improvement nature").

While it would seem clear from a statement of this test that the work of Binnings and Barnes, consisting of specialized work for which Markwell and Hartz was unequipped and unable to perform itself, was of the unrelated variety, we need not speculate upon the answer to this question. It is answered authoritatively in *Denver, supra.* That case involved a construction project common situs where employees of the general and the subcontractors worked side by side. In a dispute with the subcontractor, picketing was likewise directed at the employees of the prime. There, as here, it was found that an object of such picketing was to force or require the cessation of business, one with the other, and to force a termination of the subcontract. Deciding the question here in controversy, the Court stated:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. The Board found the relationship between [the prime contractor] and [the subcontractor] was one of 'doing business' and we find no adequate reason for upsetting that conclusion." 341 U.S. at pps. 689-690.

The Trades Council argues that there is a conflict between *Denver,* on the one hand, and *General Electric* and *Carrier,* on the other. We find no such conflict. *Denver* is cited with approval in *General Electric.*

The Council further argues that *Denver* should be limited to its precise facts, that is, where the dispute is with a

subcontractor and the general contractor is a neutral. Such a position is supported by neither logic nor authority. The statute, in condemning the secondary boycott, makes no such distinction and we are unable to say that it is less an unfair labor practice to bring economic pressure on a subcontractor to induce him to breach his contract and cease doing business with the prime, rather than where the parties are reversed. See *Piezonki v. N.L.R.B.*, 219 F.2d 879 (4th Cir. 1955); *Local Union No. 55 (PBM)*, 108 N.L.R.B. 363, affd. 218 F.2d 226 (10th Cir. 1954); *Metal Polishers Union*, 86 N.L.R.B. 1243 (cited in *Denver Trades Council*, 341 U. S. at 690); *Cf. Construction & Gen. Lab. Loc. U. No. 438 v. Hardy Eng. & Const. Co.*, 354 F.2d 24 (5th Cir. 1965).

Holding as we do that the subcontractors here were entitled to protection from the Trades Council's picketing, the Trades Council was obliged to restrict its picketing in conformity with the *Moore Dry Dock* criteria.[3] See *Sailor's Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950). The Board was warranted in concluding that the Trades Council's picketing was not in accord with *Moore Dry Dock* requirements and, therefore, an unfair labor practice.

On October 9, 1967, long after submission of this action, counsel for the N.L.R.B. filed with the clerk of this Court slip opinion of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Nashville Bldg. & Construction Trades Council*, Oct. 5, 1967, . . . F.2d . . . This opinion deals with precisely the question considered here, in a similar controversy between Markwell & Hartz, the Nashville Council, and the United Mine Workers. We have considered that opinion as well as the brief filed October 27, 1967, by New

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[3] The Board has often applied Moore Dry Dock standards to construction site picketing. See I.C.G. Elec. Inc., 142 N.L.R.B. 1418 (1963); Levitt Corp., 127 N.L.R.B. 900 (1960); St. Bridget's Catholic Congregation, Inc., 122 N.L.R.B. 1341 (1959).

Orleans Building and Trades Council in reply thereto. We cite the Sixth Circuit opinion in support of the views expressed above, and agree with the observation there made (last paragraph) that "if appellant's contention in this case is to prevail, it is a decision for the Supreme Court or for the Congress."

Enforcement of the Board's order is granted.

RIVES, Circuit Judge, specially concurring:

It seems to me that the work of the subcontractors Binnings and Barnes was "related to the normal operation" of the general contractor Markwell and Hartz, Inc. (M & H). M & H was obligated by contract to complete the filtration plant expansion job. It decided to perform about four-fifths in cost of the project with its own employees and to subcontract the balance. The pile-driving contract was awarded to Binnings and the electrical work to Barnes. When Binnings' crews honored the picket line, M & H used its own employees to complete the pile driving. While Barnes' electrical work was more highly specialized, I do not find any contention that M & H could not have employed men to do that work.

The two dissenting members of the Board definitely stated that, "In applying the *General Electric* standards to the instant case, we find that the work of Binnings and Barnes was related to the normal operations of M & H, the general contractor." (R. 112). The reasons for that finding were then elaborately stated. The three majority members of the Board agreed that " * * * the work of the neutral subcontractors in one sense is 'related to M & H's normal operations'," but nevertheless thought that the dissent's analysis "runs counter to firmly established principles governing common situs picketing in that (the construction) industry." (R. 96.)

When the work done by the secondary employees is related to the normal operations of the primary employer

there remains a distinction between picketing at the situs of the primary employer and picketing at a common situs where two or more employers are performing separate tasks on common premises. It seems to me that the opinion in *General Electric* clearly recognizes that distinction and approves the four *Moore Dry Dock* standards as applicable to common situs picketing. (See 366 U. S. at 676-679.) The *Carrier* case went no further than *General Electric* and continued to recognize the importance of the location of the picketing (376 U. S. at 497).

I agree that *General Electric* and *Carrier* are not inconsistent with *Denver*. *Denver* relates to common situs picketing. *General Electric* and *Carrier* involve illegal picketing at the premises of a struck manufacturer. Except for this difference in reasoning, I concur fully with Judge Connally.

WISDOM, dissenting:

I respectfully dissent.

I agree with the Court that in this case the *General Electric* work-related standard should be applied. The difficulty I have with the majority opinion is that the Court accepts the Board's cavalier consideration of *General Electric* and enforces the Board order—although the Board rejected the work-related standard. The Board inferred an unlawful objective simply from the picketing of the reserved gate. I am with the dissenting Board members in their view that there should be an inquiry into whether the appeals through picketing to secondary employees constituted permissible primary activity. I would remand the case to the Board for a finding on the issue of relatedness with suggestions that the Board formulate criteria for determining relatedness in common situs cases, carrying out the principles expressed in *General Electric* and *Carrier*.

With deference, I must say that I am not as certain as

the Court that *General Electric* and *Carrier* clarified *Denver* and do not conflict with that decision. *Denver* (which did not involve reserved gates) applied the *Moore Dry Dock* criteria—regardless of whether the secondary employer's work was related to the normal operations of the primary employer. In the Board's decision in *N.L.R.B. v. Nashville Building and Construction Trades Council,* 164 NLRB No. 50, enforced, 6 Cir. 1967, F.2d , involving the same question at issue here in a controversy also involving Markwell & Hartz, the Board said:

> "For in view of our holding in Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.) 155 NLRB 319, that the legality of picketing at a common situs in the construction industry is to be determined under the *Moore Drydock* standards, rather than the special guidelines laid down by the Supreme Court in Local 761, IUE (General Electric Corporation v. N.L.R.B.), 366 U. S. 667, the *work relationship test set forth in the latter is inapposite herein.*" (Emphasis added.)

In short, the Board's *Nashville decision* acknowledges explicitly that a majority of that Agency is of the view that the standards announced by the Supreme Court in *General Electric* and *Carrier* should not be applied in the context of construction industry picketing.

* * *

The provisions of Section 8(b)(4) [1] reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employ-

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[1] Section 8(b)(4) of the amended Act makes it an unfair labor practice for a union—

> (i) to engage in, or to induce or encourage any individual * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, material or commodities or to perform any services; or

ers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own". *Denver,* 341 U.S. at 692.[2] Courts and the Board have had a hard struggle to give meaning to this policy in concrete cases. "Through the many shifts of emphasis and approach manifested by the precedents, perhaps the most stable element has been discord".[3]

Section 8(b)(4), the secondary boycott provision, prohibits all union activity "where . . . an object thereof is forcing or requiring" an employer to cease doing business with "any person". Although the language of the section is broad, the section prohibits only secondary picketing.[4] Judge Learned Hand has said: "The gravamen of a sec-

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(ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[2] N.L.R.B. v. Denver Building & Constr. Trades Council, 1951, 341 U.S. 675, 692.

[3] Lesnick, "The Gravamen of the Secondary Boycott", 62 Colum. L. Rev. 1363, 3165 (1962). On the issue generally, see Lesnick, Koretz, "Federal Regulation of Secondary Strikes and Boycotts-Another Chapter", 59 Colum. L. Rev. 125, 129 (1959); Lesnick, Zimmerman, "Secondary Picketing and the Reserved Gate: The *General Electric* Doctrine", 47 Va. L. Rev. 1164 (1961); Comment, "Common Situs Picketing and the Construction Industry", 54 Geo. L. J. 962 (1966); Note, 44 Texas L. Rev. 794 (1966).

[4] See Lesnick, The Gravamen of the Secondary Boycott, 62 Colum. L. Rev. 1363, 1398-99 (1962), where the author states: "The major supports, in the statute as enacted in 1947, for a rejection of a literal approach to section 8(b)(4) have been sections 7 and 13. Section 7 purports to guarantee labor the right to engage in concerted activities, including strikes and picketing, for the purpose of mutual aid or protection, and section 13 permits inroads on that right only as specifically provided for in the act. It has been asserted that section 8(b)(4), as construed by a literal approach, is so pervasive that it 'does violence'

ondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands".[5]

The line between primary and secondary activity is relatively easy to draw where the primary and secondary employers have separate work-sites. Thus, union activity occurring at a manufacturer's own premises, and seeking no more than the disruption of his own normal operations, is considered primary and within the traditional area of protected union activity. On the other hand, activity extending beyond the premises of the primary employer to those of another employer, and designed to disrupt the operations of the latter employer, is secondary and prohibited. Compare *N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665, 672, with *N.L.R.B. v. United Brotherhood of Carpenters, etc.*, 10 Cir. 1950, 184 F.2d 60, cert. denied, 341 U. S. 947. And see generally *Retail Fruit & Vegetable Clerks Union (Crystal Palace Market) v. N.L.R.B.*, 9 Cir. 1957, 249 F.2d 591, 597-600.

A more difficult problem is presented in the common situs cases—"situations where two employers were performing separate tasks on common premises". *General Electric*, 366 U. S. at 676. Early in the development of the law under section 8(b)(4), therefore, the Board evolved criteria to aid in determining whether picketing at a com-

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to sections 7 and 13, and an alternative approach to the section must therefore be adopted. This contention rests on more than a literal reading of section 13; it finds in that section a mandate, not only to avoid, resort to general statements and policies, expressed or implicit in the act, to restrict labor's use of its traditional weapons, but also to shrink from accepting on its face the directions of an articulated prohibition when to do so would seem to go 'too far.'"

[5] International Board of Electrical Workers v. N.L.R.B., 2 Cir. 1951, 181 F.2d 34, aff'd, 341 U.S. 694.

mon situs was primary or secondary. In *Sailor's Union (Moore Dry Dock Co.)*, 92 NLRB 546, 549 (1950), a case in which the primary employer's ship was temporarily located at the secondary employer's dock, the Board stated:

> In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises: (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the locations of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. [Emphasis in original.]

The Board has since applied these "*Moore Dry Dock* standards" in common situs situations generally,[6] whether the premises were owned by the secondary employer (as in *Moore,* itself) the primary employer,[7] or some third party,[8]

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[6] This and other courts have approved the Board's general application of the Dry Dock standards. Local 761, Electrical Workers v. N.L.R.B. (General Electric Co.), 366 U.S. 667, 676-679; N.L.R.B. v. Truck Drivers & Helpers Local Union No. 728, 5 Cir. 1956, 228 F.2d 791, 796; N.L.R.B. v. International Brotherhood of Electrical Workers, Local 861, 5 Cir. 1965, 353 F.2d 736; N.L.R.B. v. Local 254, Building Service Employees, 1 Cir. 1966, 359 F.2d 289, 292; New Power Wire & Electric Corp. v. N.L.R.B., 2 Cir. 1964, 340 F.2d 71, 74; N.L.R.B. v. Highway Truckdrivers, Local No. 107, 3 Cir. 1962, 300 F.2d 317, 321; Piezonki v. N.L.R.B., 4 Cir. 1955, 219 F.2d 879, 883; N.L.R.B. v. Chauffeurs, Local Union No. 135, 7 Cir. 1954, 212 F.2d 216, 219; N.L.R.B. v. International Hod Carriers, Local 1140, 8 Cir. 1960, 285 F.2d 397, 400-401, cert. denied, 366 U.S. 903; Retail Fruit & Vegetable Clerks Union, Local 1017 v. N.L.R.B., 9 Cir. 1957, 249 F.2d 591, 595-597; N.L.R.B. v. Local Union No. 55, 10 Cir. 1954, 218 F.2d 226, 231; Seafarers International Union v. N.L.R.B., D.C. Cir. 1959, 265 F.2d 585, 589.

[7] As in Retail Fruit & Vegetable Clerks Union, Local 1017, 116 NLRB 856, enforced, 9 Cir. 1957, 249 F.2d 591.

[8] As in Atomic Projects & Production Workers, 120 NLRB 400, enforced, D.C. Cir. 1959, 262 F.2d 931.

and whether the picketing union's dispute was with the general contractor [9] or the subcontractor.[10]

Common situs picketing in the construction industry raises special problems. The building trades unions have always contended that construction of a building is an integrated enterprise in which the subcontractors are interrelated allies of the prime contractor, not independent neutrals.[11] In *Denver*, however, the Supreme Court rejected this contention. Instead, the Court looked to the traditional legal concept of the relationship between a prime contractor and his subcontractors: The subcontractors are independent contractors whose employees are not the employees of the prime contractors.[12] As separate legal entities, they are entitled to protection from secondary boycotts. The construction industry, therefore, is subject to the same restrictions as are other industries in regard to common

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[9] Local Union No. 55 (PBM), 108 NLRB 363, enforced, 10 Cir. 1954, 218 F.2d 226, Eau Claire and Vicinity Building and Construction Trades Council, 122 NLRB 1341; Hermandad de Trabajadores de la Construccion, 127 NLRB 900.

[10] E.g., Brotherhood of Painters, Local Union No. 193, 110 NLRB 455; International Association of Machinists, Local Lodge 889, 120 NLRB 753; International Brotherhood of Electrical Workers, Local 861, 142 NLRB 1006, enforced, 5 Cir. 1965, 353 F.2d 736; Millwrights Local Union No. 1102, 155 NLRB 126.

[11] "The building trades unions have been advancing this argument before Congress (thus far without success) for all of the years since Congress adopted the 'secondary boycott' provisions of the Taft-Hartley Act, 61 Stat. 136, 141-42 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964), . . ." N.L.R.B. v. Nashville Building and Construction Trades Council, 6 Cir. 1967, F.2d .

[12] "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overriden without clear language doing so. . . ." N.L.R.B. v. Denver Building and Construction Trades Council, 1951, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284.

situs picketing.[13] For purposes of the instant case, it is important to note that in *Denver,* the Court did not consider the type of work performed by the subcontractor. The test was not the *relatedness* of the subcontractor's work to the normal operations of the prime contractor; the test was whether one of the *objects* of the picketing was to force the prime contractor to cease doing business with the subcontractor.

Denver has been criticized. Numerous bills have been introduced in Congress to overrule its holding. But *Denver* still stands. Here the Board rested its decision squarely on *Denver* and *Moore Dry Dock.*

The Trades Council and the dissenting members of the Board rely on *General Electric.* They contend that under *General Electric* the lawfulness of reserved gate picketing

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[13] *Denver* would be distinguishable from the instant case under the rationale set forth by Lesnick, *supra* note 3, who poses the crucial question thus: "does the picketing union intend to subject the secondary employer to a loss of the services of his employees broader in impact than would be directly caused by the unavailability, as a result of the complete success of the strike, of the services of the primary employees? If so, the picketing is secondary; otherwise, it is primary." 62 Colum. L. Rev. at 1414. "The 'intent' that is significant . . . is the intent to subject the secondary to pressure different in kind from that generated against him by a primary strike." Id. at 1412. Under this analysis, where the union dispute is with the general contractor and pressure is put on the neutral subcontractor, the subcontractor is at worst faced with his men off work—a result that would follow if the union were successful in its primary boycott against the general. But where the dispute is with the subcontractor and pressure is put on the general's employees, the general may be faced with a cessation of work on the entire job—a result that would not necessarily occur if the primary boycott against the subcontractor were successful. Thus in the first case the picketing would be lawful (our case) in the second, unlawful (*Denver*). The Supreme Court, in *Denver,* however laid no groundwork for application of this rationale, and this Court rejected it explicitly in Superior Derrick Corp. v. N.L.R.B., 5 Cir. 1960, 273 F.2d 891. General Electric contains nothing that would now convince us otherwise.

as a primary activity depends on "the type of work that is being performed by those who use the separate gate". 366 U. S. at 680.

In *General Electric* the Court recognized that the distinction between primary and secondary activities "does not present a glaringly bright line". But the Act requires that a line drawn, even if it be "more nice than obvious". The Court addresesd itself to all secondary boycott cases:

> Almost all picketing even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success. (citation omitted) *But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.* (citation omitted) (Emphasis supplied.)

As the dissenting Board members stated:

> The whole thrust of the Court's *General Electric* decision and the *Carrier Corporation* decision is that the inference of unlawful object cannot be based simply on the fact that the picketing occurs at gates used solely by neutral employees, for the proviso to Section 8(b)(4)(B) protects all primary strike pressures which are applied with the object of halting the day-to-day operations of the struck employer. . . . The Court expressly rejected the view of the Court of Appeals for the Second Circuit "that picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees." In so doing, the Court firmly established the proposi-

> tion that direct appeals to employees of neutrals "whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" constitute protected primary activity....

General Electric involved appeals to neutral subcontractors. "The key to the problem is found in the type of work that is being performed by those who use the separate gate".

In *Carrier* the Court used the same key. Referring to *General Electric*, the Court observed:

> The Court accepted the approach neither of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice. The order of the NLRB was vacated to permit the termination of the case in accordance with the proper test. 376 U. S. at 497-98.

The Board attempts to distinguish away *General Electric* and *Carrier* on the ground that they were the product of the "lenient treatment . . . given to strike action taking place at the separate premises of a struck employer". Those decisions, so the Board and the Court here say, were

not intended to upset the traditional approach to common situs problems in the construction industry. Relying therefore on Denver (although *Denver* did not involve a separate gate) and on the *Moore Dry Dock* criteria, the Board found that the timing and the picketing at the reserved gates were not intended to reach the employees of Markwell and Hartz but had the unlawful *object* of inducing strike action by the employees of neutral Binnings and Barnes.

General Electric and *Carrier* cannot be brushed off lightly. They represent an attempt to show in what circumstances picketing of a secondary employer is permissible. Under *General Electric,* not all independent contractors are neutrals: They lose their neutral status when their work is related ("necessary") to the normal or day-to-day operations of the primary employer.

Here the Board apparently limited the use of the term "common situs" to situations where the primary and secondary employers are engaged in operations on premises owned by a third person or by a secondary employer. But the Supreme Court in *General Electric* used the term "common situs" to refer to any location where both the primary and the secondary employers were present. 366 U. S. at 676. The Board itself, in *Crystal Palace Market,* 116 NLRB 856, 859 (1956) stated: "[Moore Dry Dock] principles should apply to all common situs principles, including cases where, as here, the picketed premises are owned by the primary employer. We can see no logical reasons why the legality of such picketing should depend on title to property." The effect of the Board's decision is to apply more rigid standards to the construction industry than to the manufacturing industry. Any prime contractor would be able to frustrate the purposes of picketing by opening gates reserved for his subcontractors.

The Board assumes that if the related-work standard is applied to common construction situs, *General Electric* must be considered as having overruled *Denver sub silentio*. In *Denver*, however, the Court focused on the point that contractors and subcontractors on a construction project are not *necessarily* so interconnected that they should all be regarded as one entity. The Court did not hold that as a matter of law all independent contractors on a common situs must be considered as neutrals. In *General Electric* the Court accepted the *Denver* holding that subcontractors are separate legal entities and accepted the principle that the union may appeal to employees of a secondary employer. The Court then focused on the criteria for determining when and how the union may reach the employees of the secondary employer. The touchstone furnished by *Carrier* as well as by *General Electric* is relatedness of work. To the extent that the conclusions in *Denver* were arrived at independent of any consideration of relatedness, those conclusions must be considered as modified by application of the relatedness standard set down in *General Electric*. Here, therefore, the Board should have made a finding on the issue of relatedness. An unlawful object under Section 8(b)(4) cannot be inferred simply from the fact that the union has picketed at a gate reserved for the subcontractors' employees.

Since the Board has considered *General Electric* inapposite and has not made any finding on the issue of relatedness of work, the case should be remanded to the Board for such a finding. The Board should make the initial determination, not the Court. It is better able than this Court to formulate criteria in light of preserving the statutory balance between "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own". *Denver*, 341 U. S. at 692.

The dissenting members of the Board would apply the "related work" standard only where the dispute is with the general contractor. I agree with the majority on this point: "The plain logic of their position is equally applicable where the primary dispute is with a building subcontractor whose employees are working closely with employees of other subcontractors or those of the general contractor."

The statute, in condemning the secondary boycott, makes no such distinction and we are unable to say that it is less an unfair labor practice to bring economic pressure on a subcontractor to induce him to breach his contract and cease doing business with the prime, rather than where the parties are reversed. See *Piezonki v. N.L.R.B.*, 4 Cir. 1955, 219 F.2d 879; Local Union No. 55 (PBM), 108 NLRB 363, aff'd 10 Cir. 1954, 218 F.2d 226, *Metal Polishers Union*, 86 NLRB 1243 (cited in *Denver Trades Council*, 341 U. S. at 690); *Cf. Construction & Gen. Lab. Loc. U. No. 438 v. Hardy Eng. & Const. Co.*, 5 Cir. 1965, 354 F.2d 24.

The Court cites with approval *N.L.R.B. v. Nashville Bldg. & Construction Trades Council*, Oct. 5, 1967, F.2d , upholding the Board on the precise issue before us now. Unlike the Court in this case, however, the Sixth Circuit made no inquiry into whether the work of the secondary employer was related to that of the primary employer. The Sixth Circuit accepted, apparently with no reservations, that picketing of reserved gates is unlawful. The majority quote Judge Edward's observation "if appellant's contention in this case is to prevail, it is a decision for the Supreme Court or for Congress". I would put it the other way. There is nothing in *General Electric* or *Carrier* to suggest that the construction industry should be treated differently from other industry. The power to carve out an exception to the Act is a power that reposes in Congress—not in the Board, not in this Court.

United States Court of Appeals for the Fifth Circuit

MARKWELL AND HARTZ, INC., *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 23083
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, *Respondent.*	No. 23214

DECREE

Before: Rives and Wisdom, Circuit Judges, and Connally, District Judge.

BY THE COURT:

The above consolidated cases came on to be heard upon a petition of Markwell and Hartz, Inc. to review an order of the National Labor Relations Board, dated October 25, 1965, and upon a petition of the National Labor Relations Board to enforce said order against Building and Construction Trades Council of New Orleans, AFL-CIO. The Court heard argument of respective counsel on January 23, 1967, and has considered the briefs and transcript of record filed in this cause. On December 4, 1967, the Court,

being fully advised in the premises handed down its opinion granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that Building and Construction Trades Council of New Orleans, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

ENTERED: December 27, 1967

(ORIGINAL FILED—DECEMBER 27, 1967)

APPENDIX B

155 NLRB No. 42

D-6614
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO

and

Case No. 15-CC-201

MARKWELL AND HARTZ, INC.

DECISION AND ORDER

Upon charges duly filed by Markwell and Hartz, Inc., herein called M & H, the General Counsel of the National Labor Relations Board by the Regional Director for Region 15 issued a complaint dated January 10, 1964, against the Building and Construction Trades Council of New Orleans, AFL-CIO, herein called Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of a hearing before a trial examiner, were duly served upon the Respondent and the Charging Party. On January 17, 1964, Respondent filed its answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

On March 17, 1964, the Respondent, the Charging Party, and the General Counsel entered into a stipulation of facts and motion to transfer this proceeding directly to the Board for issuance of a Decision and Order after the filing of briefs and without further hearing. The stipulation states in substance that the parties waive their rights to a hearing before a trial examiner and to the issuance of a

trial examiner's decision, and that the charge, amended charge, complaint, answer, the stipulation, and the transcript compiled and exhibits received in evidence at a hearing before a United States District Court, Eastern District of Louisiana, New Orleans Division, in the case of *Charles M. Paschal, Jr., Acting Regional Director of the Fifteenth Region of the National Labor Relations Board* v. *Building and Construction Trades Council of New Orleans, AFL-CIO,* Civil Case No. 14128, should constitute the entire record in this case. On March 19, 1964, the Board approved the stipulation, ordered transferral of the proceedings to the Board, and granted permission to the parties to file briefs. Briefs were filed by the Respondent, Charging Party, and General Counsel. On October 12, 1964, the Board, pursuant to notice, heard oral argument at Washington, D. C., in which all parties participated.[1]

Upon the basis of the aforesaid stipulation and the entire record in the case, and having considered the briefs of the parties and the positions advanced at oral argument, the Board makes the following:

Findings of Fact

I. *The business of the Employers*

Markwell and Hartz, Inc., is a Tennessee corporation engaged as a general contractor in the building and construction industry with its principal office and place of business in Memphis, Tennessee. In the operation of its business, M & H annually receives in excess of $50,000 for services performed outside the State of Tennessee. At all times material herein, M & H has been engaged as general

[1] The Building and Construction Trades Department, AFL-CIO, filed a brief as *amicus curiae* and argued orally in support of Respondent's position. District 50, United Mine Workers, also appeared as *amicus curiae* and participated in the argument in support of the charging Party and General Counsel.

contractor on the filtration plant expansion of East Jefferson Water Works District No. 1, Jefferson Parish, Louisiana. In connection with this construction job, M & H will receive goods and materials from outside the State of Louisiana valued in excess of $50,000.

Binnings Construction Company, Inc., herein called Binnings, and Walter J. Barnes Electrical Company, herein called Barnes, are engaged as pile driving and electrical contractors, respectively, in the building and construction industry.

The parties concede and we find that M & H is engaged in commerce and that Binnings and Barnes are engaged in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

II. *The labor organization involved*

We find that Respondent Building and Construction Trades Council of New Orleans is a labor organization within the meaning of Section 2(5) of the Act.

III. *The unfair labor practices*

A. THE FACTS

In the period covered by the complaint, M & H was the general contractor on a project for expansion of a filtration plant on the premises of the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana. M & H decided to perform about 80 percent of the project with its own employees while subcontracting the balance. Included in the work contracted out was the pile-driving awarded to Binnings, and the electrical work awarded to Barnes. Both Binnings and Barnes employ members of craft unions affiliated with Respondent.

The East Jefferson Water Works is surrounded by a chain-link fence, with two vehicular gates on Jefferson

Highway which bounds the property on the north, and two additional gates on Arnoult Road, bounding the premises on the east. The gate on Jefferson Highway closest to Arnoult Road is the principal gate insofar as the construction project is concerned, and is called the main gate. On Arnoult Road the northern-most gate is the warehouse gate while the southern-most shall be referred to as the rear gate.

At all times material, Respondent has been engaged in a primary labor dispute with M & H, and has had no dispute with either Binnings or Barnes.

On October 17,[2] in connection with its dispute with M & H, Respondent commenced picketing the gates leading to the jobsite. The picketing took place during normal work hours, with the number of pickets varying from one to three individuals. The picket sign listed both the rates that should be paid on the job and carried the following message:

MARKWELL AND HARTZ
GENERAL CONTRACTOR
DOES NOT HAVE A SIGNED AGREEMENT WITH
THE BUILDING AND CONSTRUCTION
TRADES COUNCIL OF NEW ORLEANS
AFL-CIO

The picketing continued until enjoined in the aforementioned 10(1) proceeding on January 16, 1964. At no time during the picketing did employees of Binnings or Barnes cross the picket line to perform work in connection with their employers' subcontract.

The validity of Respondent's picketing prior to October 23 is not in issue. However, on that date M & H posted the two gates on Jefferson Highway and the warehouse gate

[2] Unless designated, all dates refer to 1963.

on Arnoult Road, reserving them for use of subcontractors and persons making deliveries to the project, and prohibiting their use by M & H's employees. The rear gate on Arnoult Road was designated for exclusive use of the latter.

That morning, when Respondent's picket encountered the newly marked gates, he moved to the rear gate which was reserved for M & H's employees. As a result, pile-driving crews employed by Binnings entered the main gate and began working. About an hour and a half later the picket returned to the main gate, and Binnings' employees walked off. M & H then decided to remove its employees, with the exception of the superintendent and project engineer, in the hope that Binnings would then be able to complete the pile-driving work. By 10 o'clock that morning its employees were off the site. Though Respondent was notified of the absence of the primary employees, the picketing continued. When Binnings' crews again honored the picket line, M & H recalled its employees. They reported to work on October 24 at 10 a.m. to complete the pile-driving work themselves.

On November 14, M & H changed the signs on the Jefferson Highway gates to indicate that these entrances were not to be used by employees of M & H or carriers and suppliers making deliveries to M & H, and that such persons were to use the rear gate on Arnoult Road. M & H informed Respondent of these changes and notified suppliers to use the rear gate only. Identical changes were made at the warehouse gate on November 16, and on December 6 the rear gate was marked as reserved for use of employees of M & H and suppliers and carriers making deliveries to M &H.

The record does not show that the gates were at any time used in a manner inconsistent with the postings. Except-

ing a brief period on October 23, and the period between December 16-20, Respondent picketed the gates which were posted for exclusive use of subcontractors and which were not used by M & H's employees and suppliers.[3]

B. Discussion

On these facts, we are asked to decide whether a union, in furtherance of a primary dispute with a general contractor in the construction industry, may lawfully engage in jobsite picketing at gates reserved and set apart for exclusive use of neutral subcontractors. In this connection, the General Counsel and Charging Party contend that Respondent's picketing of the subcontractor gates exceeded permissable bounds of primary action and, thereby, demonstrated that Respondent unlawfully sought to enmesh secondary employers in its dispute with the general contractor. The Respondent, without denying that its conduct fell within the prohibitory terms of Section 8(b)(4)(i) and (ii)(B) of the Act, argues that the picketing was at all times in furtherance of its primary dispute with M & H and protected by the "primary strike and picketing proviso."[4] Specifically, Respondent asserts that, as the work of the subcontractors purportedly related to the normal operations of M & H, the Supreme Court's decisions in *Electrical Workers Local No. 761* v. *Labor Board (General Electric Co.)*[5] and *Steelworkers* v. *Labor Board (Carrier Corp.)*,[6]

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[3] Because M & H, Binnings, Barnes, and suppliers and carriers making deliveries to M & H are the only persons identified as using the four gates, it is assumed that, after November 16, Binnings and Barnes and their employees had exclusive use of all gates save the "rear gate" set aside for M & H, its employees, and persons making deliveries to it.

[4] "Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

[5] 366 U.S. 667.

[6] 376 U.S. 492.

compel dismissal of the complaint herein. We do not agree with the Respondent's position.

In *General Electric* the Supreme Court ruled that the picketing "at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises" is lawful primary activity *unless* the following conditions exist:

> There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer; and the work must be of a kind that would not, if done when the employer were engaged in its regular operations, necessitate curtailing those operations.[7]

Subsequently, in *Carrier Corp.*, the Court approved the Board's application of these standards so as to permit, as legitimate primary action, picketing of a gate, owned by a railroad but cut through a fence surrounding the struck employer's premises. This gate was used exclusively by neutral railroad employees entering the struck premises to perform delivery activities related to the normal operations of the struck employer.

Without passing upon whether the subcontractor gates involved herein were established and maintained in accordance with the *General Electric* requirements, we are of the opinion that the principles expressed in that case are inapposite in determining whether a union may lawfully extend its dispute with a general contractor on a construction site by picketing gates reserved for exclusive use of subcontractors also engaged on that project. Rather, we believe that this issue must be resolved in the light of the

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[7] *Electrical Workers Local No. 761* v. *Labor Board (General Electric Co.), supra*, p. 681.

Moore Dry Dock standards,[8] traditionally applied by the Board in determining whether picketing at a common situs is protected primary activity.

Unlike *General Electric* and *Carrier Corp.*, both of which involved picketing *at the premises of a struck manufacturer*, the picketing in the instant case occurred at a construction project on which M & H, the primary employer, was but one of several employers operating on premises owned and operated by a third party, the Jefferson Parish Water Works. Picketing of neutral and primary contractors under such conditions, has been traditionally viewed as presenting a "common situs" problem.[9]

Over the years, the distinction between common situs

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[8] *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547. Specifically, the Board held that picketing of premises occupied by secondary employers is lawful if the following conditions are met: (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

[9] See *Hermandad de Trabajadores de la Construccion (Levitt Corp.)*, 127 NLRB 900; *Eau Claire and Vicinity Bldg. & Const. (St. Bridgets Catholic Cong.)*, 122 NLRB 1341; and *Local 55 (PBM)*, 108 NLRB 363, enfd, 218 F.2d 226 (C.A. 10). The Board, in the *PBM* case, rejected a contention that, where the union's dispute is with the general contractor, the entire project must be viewed as the primary situs, stating at p. 366, that:

> The Supreme Court has rejected the view that prime contractors and subcontractors working on a construction project constitute for present purposes a single integrated operation. The Supreme Court has agreed with the Board "in its conclusion that the fact that the contractor and subcontractor were engaged in the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *N.L.R.B.* v. *Denver Bldg. Council*, 341 U.S. 675, at 689-690.

picketing and that which occurs at premises occupied solely by the struck employer has been a guiding consideration in Board efforts to strike a balance between the competing interests underlying the boycott provisions of the Act.[10] Mindful of the fact that "Congress did not seek, by Section 8(b)(4), to interfere with the ordinary strike," [11] the Board has given wide latitude to picketing and related conduct confined to the sole premises of the primary employer.[12] On the other hand, in the interest of shielding "unoffending employers" from disputes not their own, the Board has taken a more restrictive view of common situs picketing, requiring that it be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." [13]

In accordance with the foregoing, the Board, in determining whether a labor organization, when picketing a common situs, has taken all reasonable precaution to prevent enmeshment of neutrals, traditionally applies the limitations set forth in the *Moore Dry Dock* case. In our opinion application of these standards to all common situs situations, including those, which like the instant case, involve

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[10] It is the duty of the Board to balance "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 692.

[11] *International Rice Milling Co.* v. *N.L.R.B.*, 341 U.S. 665, 672.

[12] See *Oil Workers International Union (Pure Oil Company)*, 84 NLRB 315; *Newspaper & Mail Deliveries' Union (Interborough News Co.)*, 90 NLRB 2135; *International Brotherhood of Teamsters (Di Giorgio Wine Co.)*, 87 NLRB 720, 744-746, affd. 191 F. 2d 642 (C.A. D.C.); *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 NLRB 856, 860, footnote 10, enfd. 249 F. 2d 591 (C.A. 9).

[13] *Crystal Palace Market, supra*, p. 859.

picketing of gates reserved exclusively for neutral contractors on a construction project, serves the "dual congressional objectives" underlying the boycott provisions of the Act.

The instant facts, when considered in the light of the legislative history and decisional precedent, do not warrant a departure from our long established policy with respect to common situs picketing. Quite to the contrary, our continued adherence to the *Moore Dry Dock* standards in such cases comports with the clear expression of Congress, in enacting the "primary strike and picketing" proviso, that said proviso ". . . does not eliminate, restrict, or modify the limitations on picketing at the site of a primary dispute that are in existing law."[14] Nor do the Supreme Court's decisions in *General Electric* and *Carrier* detract from our conclusions in this regard; for, the mere fact that picketing of a neutral gate *at the premises of a struck employer,* may in proper circumstances be lawful primary action, does not require a like finding when a labor organization applies *direct* pressure upon secondary em-

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[14] As indicated by the following statement on the part of the House conferees, the enactment of specific language protecting primary activity was accompanied by express preservation of the *Denver Building Trades* and *Moore Dry Dock* cases:

> . . . the amendment adopted by the committee of conference contains a provision "that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The purpose of this provision is to make it clear that the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); . . . *Moore Dry Dock Co.*, (81 NLRB 1108) [sic] . . . *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, Volume 1, page 942.

ployers engaged on a *common situs.*[15] That the Supreme Court had no intention of overriding this historic distinction is evidenced by its express approval of the *Moore Dry Dock* standards,[16] and its observation that the *General Electric* case did not present a common situs situation to which the *Moore Dry Dock* standards should apply.[17] It is plain, therefore, that the Court did not seek to interfere with the Board's traditional approach to common situs problems;[18] rather, the Court's decision in *General Electric* and *Carrier Corp.*, merely represent an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer.

Applying the *Moore Dry Dock* standards[19] to the instant case requires the timing and location of the picketing and the legends on the picket signs to be tailored to reach the employees of the primary employer, rather than those of the neutral employer, and deviations from these requirements establish the secondary object of the picketing and render it unlawful. Indeed, our dissenting colleagues do not disagree with this principle, but cite the *PBM* decision[20]

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[15] The diverse inferences to be drawn from economic pressures applied to neutrals at the premise of a struck employer and that applied at a common situs were recognized in early decisions of the Supreme Court interpreting Section 8(b)(4). Thus, in *N.L.R.B.* v. *Local 74, United Brotherhood of Carpenters (Ira A. Watson Company)*, 341 U.S. 707, in finding a union's inducement of work stoppages at a common situs to be secondary and unlawful, the Court distinguished *International Rice Milling Co., supra*, pointing out at page 712, that picketing at the premises of the struck employer was not involved.

[16] *Local 761, IUE* v. *N.L.R.B. (General Electric Co.), supra*, p. 679.

[17] *Steelworkers* v. *N.L.R.B. (Carrier Corp.), supra*, p. 497.

[18] As stated by the Supreme Court in *Denver Building and Construction Trades Council, supra*, p. 692; "the Board's interpretation of the Act and . . . application of it in doubtful situations are entitled to weight."

[19] *Supra*, footnote 8.

[20] *Supra*, footnote 9.

with apparent approval. If the mere failure, as in *PBM*, to name the general contractor on the picket signs as the sole disputant suffices to demonstrate that a union is seeking to induce employees of the subcontractors not to work, it is self-evident that picketing a gate used solely by the neutral subcontractors demonstrates the same purpose. And if it is unlawful to induce such employees in the indirect, and more subtle, fashion represented by the facts in *PBM*, it is *a fortiori* unlawful in the direct inducement of such employees at a separate gate. *PBM*, in short, stands for the proposition that the relationship of a subcontractor to a general contractor does not make the former's employees fair game in connection with a union's dispute with the latter. The sole difference between *PBM* and the instant case lies in the means used to convey the union's respective messages to the employees of the neutral subcontractors. That this is an irrelevant difference is established by the Supreme Court's holding, in *International Brotherhood of Electrical Workers* v. *N.L.R.B. (Samuel Langer)*,[21] that "The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion." Since Respondent's picketing at the neutral gates of Binnings and Barnes continued after *November 16*, we find, in agreement with the General Counsel, that the picketing after that date[22] failed to comply with the *Moore Dry Dock*

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[21] 341 U.S. 694, 701-702.

[22] We do not regard, as unlawful, Respondent's picketing prior to November 16, as it was on that date that the respective neutral gates were first marked to preclude use by persons making deliveries to M & H. Although a common situs problem is presented where a gate is reserved for both neutral subcontractors and persons making deliveries to a struck contractor, a balance of the competing interests underlying 8(b)(4)(B) requires our respecting the traditional right of labor organizations to appeal to such deliverymen as a lawful incident of legitimate strike action against the primary employer. See *Crystal Palace Markets*, *supra*. p. 861.

In so finding, we note that, on October 23, M & H withdrew its

requirement that such action take place reasonably close to the situs of Respondent's dispute with M & H. We are completely satisfied that Respondent's picketing at the subcontractor gates was to induce strike action by employees of subcontractors with whom Respondent had no dispute. By such conduct, Respondent unlawfully sought to disrupt the operations of the neutral subcontractors and their employees and to enmesh them in the primary dispute in a manner which could not be condoned as an unavoidable by-product of legitimate primary picketing.

The dissent does not persuade us otherwise. The dissent's analysis, although well-stated and on first reading not unreasonable as an application of *General Electric* standards in a construction industry setting, nevertheless runs counter to firmly established principles governing common situs picketing in that industry. Simply because the work of the neutral subcontractors in one sense is "related to M & H's normal operations," our dissenting colleagues would exonerate the pickets' appeal to the secondary employees to honor the picket line aimed at M & H. And notwithstanding their suggestion (in footnote 35) that they would apply the "related work" standard only where

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employees for a 24-hour period in an attempt to prevent any legitimate picketing of the project. It is apparent that the primary employees were removed from the project though work was then available for them, that they could have been recalled at any time, that M & H's superintendent and project engineer remained on the job at all times, and that M & H otherwise continued its duties as general contractor during the 24-hour absence of its employees. In the circumstances, we are satisfied that despite the removal of its workers, M & H was then engaged in its normal business on the project, and that Respondent's continued picketing during this period fully complied with *Moore Dry Dock*, and did not evidence a departure from what at that time constituted lawful primary action. *Local 3, IBEW, AFL-CIO (New Power Wire and Electric Corp.)*, 144 NLRB 1089; *IBEW, Local 861, AFL-CIO (Brownfield Electric, Inc.)*, 145 NLRB 1163; and *Seafarers' International Union* v. *N.L.R.B. (Salt Dome Production Co.)*, 265 F. 2d 585 (C.A. D.C.).

the dispute is with a general contractor, the plain logic of their position is equally applicable where the primary dispute is with a building construction *sub*contractor whose employees are working closely with employees of other subcontractors or those of the general contractor. Given the close relation—which is not only characteristic of but almost inevitable at many stages of a building construction project—of the work duties of the various other employees with those of the primary subcontractor, the principle of the dissent would also permit picket line appeals to the employees of the neutral general contractor and other subcontractors whatever the situation as to common or separate gates.

But it was precisely this claim, that the *close* working relations of various building construction contractors on a common situs involved them in a common undertaking which destroyed the neutrality and thus the immunity of secondary employers and employees to picket line appeals, that the Supreme Court rejected in *Denver Building Trades*. And there is not the slightest intimation by the Court in *General Electric* or *Carrier* that it was reversing or revising the rule in *Denver*. Although our dissenting colleagues disclaim such a purpose, by applying the "close relation to normal operations" test of *General Electric*, the theory of the dissent, if logically extended, is one that would in effect reverse *Denver* not only where the overarching general contractor on the building site is the primary employer, but also, where the intertwined work of a construction *sub*contractor is the primary target.

We are not constrained, without much plainer indications laid down by the Court in an entirely different set of circumstances to a situation in which the prior Board and Court interpretations of the statutory protection established for neutrals are clear and have been long understood

by the parties to labor-management relations and by the Congress.[23]

For the reasons stated, we conclude that Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing employees of Binnings and Barnes to engage in work stoppages, and by restraining and coercing said Employers, for an object of forcing or requiring them to cease doing business with M & H.

IV. *The effects of the unfair labor practice upon commerce*

The activities of the Respondent set forth above, occurring in connection with the operations of M& H, Binnings, and Barnes as set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The remedy*

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action that we find necessary to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, we adopt the following:

CONCLUSIONS OF LAW

1. Markwell and Hartz, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company are persons engaged in an

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[23] See for example the recurrent hearings and Committee reports on consideration of "situs picketing" legislation.

industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

4. By inducing individuals employed by Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company to engage in a strike or refusal in the course of their employment to perform services, with an object of forcing said persons to cease doing business with Markwell and Hartz, Inc., Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(B), and Section 2(6) and (7) of the Act.

5. By threatening, coercing, and restraining Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company, with an object of forcing said persons to cease doing busines with Markwell and Hartz, Inc., Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B), and Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Building and Construction Trades Council of New Orleans, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing individuals employed by Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company to engage in a strike or refusal in the course of their employment to perform services, where an object thereof is to force or require said persons to cease doing business with Markwell and

Hartz, Inc., under circumstances prohibited by Section 8(b)(4)(i)(B) of the Act.

(b) Threatening, restraining, or coercing Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company, where an object thereof is to force or require said persons to cease doing business with Markwell and Hartz, Inc., under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls, in New Orleans, Louisiana, copies of the attached notice marked "Appendix."[24] Copies of said notice, to be furnished by the Regional Director for Region 15, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 15 sufficient copies of said notice, to be furnished by him, for posting by Binnings Construction Company, Inc., and Walter J. Barnes Electrical Company, if willing.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

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[24] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

Dated, Washington, D. C.

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Members Fanning and Jenkins, dissenting:

We dissent from the majority's conclusion that Respondent violated Section 8(b)(4)(B) of the Act by picketing, in the course of its primary dispute with Markwell & Hartz, gates reserved for employees of the subcontractors M & H had engaged to aid it in performing the construction work it was obligated to complete. In our view, the majority has inferred that Respondent's picketing was for an unlawful object simply from the fact that the reserved gates were used only by secondary employees, without inquiry into the question of whether the appeals to such employees, were, in the circumstances of this case, permissible primary activity, an inquiry which we believe is required by the Supreme Court's decisions in *General Electric*[25] and *Carrier Corp.*[26] As we believe, for reasons stated below, that the Court is those decisions applied principles of general application, we dissent from the majority's conclusion that the tests announced in *General Electric* for determining whether appeals to employees of neutral con-

[25] *Local 761, IUE* v. *N.L.R.B. (General Electric)*, 366 U.S. 667.

[26] *United Steelworkers of America, AFL-CIO* v. *N.L.R.B. (Carrier Corp.)*, 376 U.S. 492.

tractors constitute legitimate primary activity are not applicable to the building and construction industry.

In its initial decision in *General Electric*,[27] the Board held that picketing of a gate reserved by the primary employer for the exclusive use of employees of neutral contractors engaged by it to perform work on its premises was unlawful because the union's object was "to enmesh these employees of the neutral employers in its dispute with the Company" by encouraging them to engage in concerted action "with an object of forcing the independent contractors to cease doing business with the Company." The Circuit Court of Appeals for the District of Columbia granted enforcement[28] and the Supreme Court accepted the case for review because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification."[29]

The Court's opinion contained a thorough survey of the cases dealing with secondary picketing activity, including common situs cases, and it is apparent that the Court was concerned with defining with particularity the distinction between legitimate "primary activity" and banned "secondary activity." Conceding that the distinction between the two types of activity "does not present a glaringly bright line," the Court noted that the Act compels the task of drawing lines "more nice than obvious," and in a carefully considered statement which obviously applies to the entire spectrum of secondary boycott cases reminded the Board that

> Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other

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[27] 123 NLRB 1547.

[28] 278 F.2d 282.

[29] *General Electric, supra*, at 671.

> motives there may be and however small the chances of success. (citation omitted) *But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.* (citation omitted) [Emphasis supplied.]

The underscored sentence from the above quotation succinctly states the issue which the Board must decide in this case: was Respondent's picketing for an object of inducing employees of the neutral subcontractors to take action to force their employers to cease dealing with M & H; or was its object merely to induce such employees to respect the picket line thrown up around M & H's operations, and, if so, does such activity constitute legitimate primary activity? This issue is no different from the issue posed by the facts in the *General Electric* case itself, for there the Board inferred an unlawful object simply from the fact that the picketing called into question by the complaint occurred at a gate not used by primary employees, and was directed solely to neutral employees. The whole thrust of the Court's *General Electric* decision and the *Carrier Corporation* decision is that the inference of unlawful object cannot be based simply on the fact that the picketing occurs at gates used solely by neutral employees, for the proviso to Section 8(b)(4)(B) protects all primary strike pressures which are applied with the object of

> halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike: it also saved primary picketing from the ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise con-

> tributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for neutral deliverymen furnishing day-to-day service essential to the employer's regular operation.[30]

The Court expressly rejected the view of the Court of Appeals for the Second Circuit "that picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees." In so doing, the Court firmly established the proposition that direct appeals to employees of neutrals "whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" constitute protected primary activity.

But it is not only direct appeals to employees of suppliers and deliverymen which were found to constitute direct primary action. The *General Electric* case involved appeals to employees of neutral subcontractors and the Court, noting that "the key to the problem is found in the type of work that is being performed by those who use the separate gate," held that, before such appeals may be ruled unlawful under Section 8(b)(4)(B),

> There must be a separate gate, marked and set apart from other gates: the work done by the men who use the separate gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were

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[30] *Carrier Corp, supra.* In the *General Electric* decision the Court stated the same proposition in the following form: ". . . if a separate gate were devised for regular plant deliveries, the barring of picketing at that gate would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."

> engaged in its regular operations, necessitate curtailing those operations.

The crucial consideration regarding this holding is not, as the majority apparently views it, that it was made with respect to conduct occurring in connection with a strike at an industrial plant, but that it held that appeals to respect a picket line made to employees of secondary employers whose operations do not meet the tests stated above constitute legitimate primary activity just as do similar appeals to employees of neutral suppliers and deliverers.

In view of the foregoing, we find, contrary to the majority opinion, that the principles set forth in the *General Electric* decision, and the tests there enuciated by the Court for the application of those principles, govern picketing in the construction industry as well as in other industries. In view, neither the fact that the Court expressly approved the *Moore Dry Dock* standards, nor its holding that the *General Electric* case did not present a common situs situation to which those standards should be applied, requires a different conclusion. The *Moore Dry Dock* standards were not designed to restrict primary activity at common situs disputes, but rather to assure that banned secondary activity would not be permitted, and though the Court did express approval of those standards, it noted too that

> As is too often the way of law or, at least, of adjudications, soon the *Dry Dock* tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity. For example, failure of picket signs clearly to designate the employer against whom the strike was directed was held to be violative of 8(b)(4)(A). (Citation omitted).

Furthermore, it is clear that, had the Board concluded in

its decision on remand in the *General Electric* case[31] that the work of the neutral contractors was not directly related to General Electric's normal operations, the application of the *Moore Dry Dock* tests to the picketing of the reserved gate in that case would be permissible.

The majority declines to apply the *General Electric* tests to common situs picketing in the building and construction industry because, in its view, historic Board policies governing common situs picketing require that such picketing be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees" and because "the Court's decisions in *General Electric* and *Carrier Corp.*, merely represent an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer." The logic of the first quotation is simply that common situs picketing must be confined to direct appeals to the employees of the primary employer and that appeals to employees of neutrals are permissible only where incidental thereto—a view expressly repudiated by the Supreme Court in *Carrier Corp., supra*, p.498. Under such logic, there is no warrant for the majority's conclusion that the picketing of the re-

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[31] 137 NLRB 342. In this connection, the Board found that construction operations performed by contractors for General Electric, whose employees also were engaged in similar construction work, were "directly related" to General Electric's operations, thus giving the union engaged in a primary dispute with General Electric the right to make direct appeals to employees of the neutral contractors to honor its picket line. It is ironical, to say the least, for the majority now to hold that the undisputed direct relationship which does exist between the operations of general contractors and their subcontractors in the building and construction industry goes for nought in determining whether a striking union's picket line publication of its primary dispute with the general contractor, with consequent appeals to neutral employees to respect the picket line, constitutes legitimate primary activity.

served gate did not violate 8(b)(4)(B) prior to November 16 because the gates were being used by employees making deliveries to M & H. The majority's conclusion is flatly inconsistent with the very principles it states it is applying to this case.

We, of course, do not quarrel with the conclusion that Respondent had the right to appeal to employees delivering supplies and materials to M & H to respect the picket line, for such conclusion, grounded as it inescapably is on the premises underlying the Supreme Court's decision in *Carrier Corp.*, seems eminently correct, and in no way obstructive of the Board's obligation to prohibit unlawful secondary activity under Section 8(b)(4)(B). It undoubtedly is too late in the day to argue that appeals to employees making deliveries to a primary employer in the construction industry are not legitimate primary activity. Certainly, it cannot be so argued on the faulty premise that Congress intended "more lenient" treatment of picketing at industrial sites than it intended for picketing of sites in the building and construction industry. Indeed, if the special treatment accorded the building and construction industry in Section 8(e) and 8(b)(4)(A) is considered, it could be argued that Congress intended that more "lenient treatment" be given to secondary activity in building and construction industry than in manufacturing industries generally.[32] We do not rest our position in this case on that ground, however. Rather, we believe that, because the Supreme Court clearly equated picket line appeals to employees of neutral subcontractors whose tasks aid the every day operations of the struck employer with similar appeals to employees of neutral suppliers and deliverers, there is

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[32] The majority advances no reason why an employer in the construction industry should be permitted to designate or limit the places of primary activity against him, while those in other industries may not do so.

no warrant for distinguishing between the two situations in this case, as the majority has done. As the Court determined that such appeals constitute primary activity protected from the reach of 8(b)(4)(B) by the proviso thereto, unless the neutral contractor's operations meet certain tests, we believe it incumbent upon the Board to determine whether such tests are met, and we see no particular difficulty in applying the *Moore Dry Dock* standards in a manner entirely consistent with such tests.

Significantly, Congress has not seen fit to distinguish between industries, by adopting a more narrow definition of the lawful scope of picketing in the construction industry than is permitted in other industries. Certainly, the economic pressure sustained by neutral subcontractors as a consequence of reserved gate picketing on a construction job is no different from that imposed by like conduct upon neutral subcontractors performing work on premises occupied by a struck manufacturer. Nor is it any different from the pressures sustained by neutral suppliers making deliveries to the struck primary employer whether he be a manufacturer or a general contractor in the building and construction industry. Accordingly, it is only by determining the legality of reserved gate picketing by standards generally applicable to all industries that the dual Congressional objectives[33] are served and the competing interests of picketing unions and secondary employers protected.

Nor do we regard the Court's decision in *Denver Building and Construction Trades Council*[34] as precluding application of *General Electric* to the instant case. In *Denver*, the Court held that despite their close relationship, the several contractors on a construction job were not allies

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[33] *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 692; Local 761, *IUE* v. *N.L.R.B. (General Electric)*, *supra*.

[34] *Id.*

or a single employer for purposes of the boycott provisions of the Act.[35]

The Supreme Court in *General Electric* affirmed the rule stated in *Denver* and, accepting the separate legal status

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[35] *Id.*, pp. 680-690. In *Denver*, the conduct evidencing the union's objective of enmeshing the neutral employer was its demand that the neutral general contractor remove a nonunion subcontractor from the project, which demand was accompanied by picketing which failed to disclose that the Respondent Council's primary dispute was only with a nonunion subcontractor. These facts plus the other factors supporting the finding that the picketing constituted a "signal in the nature of an order to the members of the affiliated unions to leave the job and remain away until otherwise ordered" demonstrated the secondary objectives of the picketing, and distinguishes that case from the instant case. Here, in contrast, the Respondent's primary dispute is with the general contractor and the picketing clearly discloses this fact. Similarly too, the *PBM* decision relied on by the majority is distinguishable from the instant case in that the picket signs did not satisfy the *Moore Dry Dock* requirement of clearly disclosing that the union's primary dispute was with the insurance company-general contractor, and the conduct of the Respondent unions vis-a-vis neutral employees and subcontractors working on the "unfair" project was such as to lead the Board and the Court of Appeals to conclude that the picketing was directed against the subcontractors to cause them to cease doing business with the general contractor. Thus, those cases illustrate instances where a union's pressures were aimed directly at employees of neutral employers in order to induce them to engage in concerted action to force their employers to cease doing business with the primary employer. We have no quarrel with the requirement that a union's picketing at a common situs must clearly disclose that its dispute is with the primary employer. We in fact insist upon observance of that requirement but, when it and the other *Moore Dry Dock* requirements are observed, we believe that there is no warrant for inferring that the picketing is for an object other than to induce employees to honor the picket line. In view of the *General Electric* decision, we believe that the *Moore Dry Dock* tests cannot be applied in a manner which will bar primary appeals to employees of employers whose operations are directly related to the normal operations of the struck employer. In so finding, we do not imply that simply because a union has a dispute with one subcontractor on a construction project, appeals to employees of other subcontractors using different gates constitute primary appeals within the meaning of the *General Electric* decision. *Northern California District Council of Hod Carriers and Common Laborers of America, AFL-CIO, et al. (Joseph's Landscaping Service)*, 154 NLRB No. 116. *Painters District Council No. 38, Brother-*

of *General Electric* and its contractors,[36] addressed itself to the question whether the picketing involved had an unlawful secondary objective. Here, too, we accept the proposition that the various contractors at a construction job are separate employers[37] and concern ourselves only with the circumstances under which the Board, absent direct proof of admission, may properly infer that the picketing involved had an unlawful secondary objective.

In applying the *General Electric* standards to the instant case, we find that the work of Binnings and Barnes was related to the normal operations of M & H, the general contractor. In this connection it is relevant that employees of the named subcontractors were scheduled to work during

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hood of Painters, Decorators and Paperhangers of America, AFL-CIO (Edgewood Contracting Company), 153 NLRB No. 70. See also *Orange Belt District Council of Painters No. 48, AFL-CIO (Calhoun Drywall Company)*, 154 NLRB No. 83. In such situations, the work of the employees of the neutral general contractor and subcontractors, though obviously bearing a close relationship to the work of the primary employees, is nevertheless not work which the primary subcontractor has obligated himself to perform or which lies within his power to control or to assign to whomsoever he sees fit. It is therefore not "related to the normal operations of the [primary] employer" nor does it "otherwise contribut[e] to the operations which the strike is endeavoring to halt" within the meaning of the *General Electric* and *Carrier* decisions. In similar fashion, we would not, in the direct converse of the *General Electric* case where the primary dispute is with a *General Electric* subcontractor, apply the *General Electric* principles to preclude *General Electric* from setting up separate gates for its own employees and those of subcontractors not involved in the dispute for the purpose of confining the picketing to those gates used by the employees of the struck primary subcontractors and his suppliers.

[36] In *General Electric*, the Board's finding that the primary and secondary employers were not allies (123 NLRB 1547, 1548, footnote 3) was not disputed and was part of the record before the Supreme Court in its consideration of the case.

[37] For an illustration of legal principles and proposed legislative language which would overrule the *Denver Building Trades* decision, see the recurrent hearings and Committee reports on consideration of "common situs picketing" amendments to the Act. Comparison of such pro-

the picketing period together with the employees of M & H in completing the filtration plant expansion job.[38] In addition, during this period, M & H's project engineer and superintendent were to work with the subcontractors to insure that M & H's commitment to the owner was performed in compliance with project specifications. We find that M & H's portion of the work on this job was part of its normal operations, as was completion of the entire project, and that the work of the subcontractors was related to both M & H's work on the job and its responsibility to complete the project itself, and hence related to M & H's normal operations.[39] We, accordingly, hold that the work of the

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posed amendments with our decision herein clearly reveals that the application of the *General Electric* principles to the construction industry does not constitute reversal of the *Denver Building Trades* principle that the various contractors and subcontractors on a construction project are separate employers doing business with each other within the meaning of Section 8(b)(4) of the Act, our colleagues assertion to the contrary notwithstanding. Whether such legislation is or is not in the public interest is, of course, for the Congress to determine. We are not constrained, however, by such current consideration of a complex issue, to hold, as does the majority, that application of general principles enunciated by the Supreme Court must be limited to the precise set of circumstances that occasioned their formulation.

[38] M & H undertook to perform about 80 percent of the project with its own employees, while subcontracting the balance. It also appears that M & H in certain instances could not work until completion of a subcontractor's phase of the job, while in others subcontractors would have to hold up while M & H was performing.

[39] In so finding, we reject the General Counsel's view that the "unrelated work" condition is met unless the work is "identical or substantially similar" to that of the primary employer. The work of those using the reserved gate may be related to the normal operations of the primary employer though not "identical or substantially similar" to that normally performed by the latter. *General Electric*, 138 NLRB 342. Thus, in the portion of that decision dealing with the construction of a truck dock and mezzanine, the Board held the work of the neutral contractors to be related to the struck manufacturer's normal operations despite the finding that "the portion of the work scheduled to be done by the independent contractors on these jobs was not the type that previously had been done by GE employees." Also, see the Board's decision in *Carrier*

subcontractors failed to meet the "unrelated work" condition[40] and, on this basis, we find that Respondent had the right to appeal to the employees of the subcontractors to honor its picket line around M & H's operations.

This being the case, the fact that such appeals were addressed to those employees at gates reserved for their exclusive use by M & H furnishes no basis for the majority's conclusion that the picketing after November 16 "failed to comply with the *Moore Dry Dock* requirement that such action take place reasonably close to the situs of Respondent's dispute with M & H." As the Supreme Court indicated in the *General Electric* decision, the barring of picketing through the device of a gate reserved for the exclusive use of secondary employees whose tasks aid the struck employer's every day operations constitutes a clear invasion of traditional primary activity. Furthermore, the *Moore Dry Dock* tests are utilized by the Board to aid it in determining whether certain kinds of picketing constitute proscribed secondary or protected primary activity whereas the *General Electric* tests are designed to aid in determining whether a union has the right to appeal directly to the secondary employees using a reserved gate. Accordingly, it seems obvious that the former tests must be applied in a manner which will give full effect to the latter tests. As we find that Respondent had the right to appeal to the employees of the neutral subcontractor, we find that the picketing at the reserved gates constituted compliance with the requirement that its picketing be

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Corp. 132 NLRB 127, where the "related work" finding was not based upon evidence that employees of the struck manufacturer had performed work identical or substantially similar to that scheduled for the neutral railroad employees.

[40] Having found that the work of those using the reserved gate was directly related to the normal operations of M & H, we need not decide whether, or under what circumstances, the "interruption of operations" test applies to reserved gate picketing in the construction industry.

limited to places reasonably close to the situs of Respondent's dispute with M & H. Accordingly, as the picketing also conformed to the other *Moore Dry Dock* tests, we perceive no basis on which to conclude that Respondent's object in picketing the reserved gates was to induce the employees of M & H's subcontractors to engage in a refusal to perform services with the object of forcing their employers to cease dealing with M & H.

Accordingly, we would find that Respondent's picketing did not violate Section 8(b)(4)(B), and we would dismiss the complaint.

Dated, Washington, D. C.

John H. Fanning, Member

Howard Jenkins, Jr. Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, *et seq.*), are as follows:

* * * * *

UNFAIR LABOR PRACTICES

* * * * *

Section 8. (b) [29 U.S.C. § 158(b)] It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1967

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COMEN,
Assistant General Counsel,

National Labor Relations Board,
Washington, D.C. 20570.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1292

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 387 F. 2d 79. The decision and order of the National Labor Relations Board (Pet. App. 24a-53a) are reported at 155 NLRB 319.

JURISDICTION

The decree of the court of appeals (Pet. App. 22a-23a) was entered on December 27, 1967. On Febru-

ary 20, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari until April 4, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether construction-site picketing directed at neutral subcontractors, where the union's dispute is only with the general contractor, constitutes unlawful secondary activity, without regard to whether the work being performed by the neutral employers is related to the normal operation of the primary employer's business.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (p. 54a).

STATEMENT

Petitioner (the "Union") had a primary labor dispute with Markwell and Hartz, Inc. ("Markwell"), the general contractor for the expansion of a filtration plant at the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana (Pet. App. 25a-26a, 27a).[1] Although Markwell performed a sub-

[1] Markwell had a collective bargaining agreement, covering its own employees, with District 50 of the United Mine Workers of America, a labor organization not affiliated with peti-

stantial amount of the work on the project with its own employees, it subcontracted the balance to 19 specialty subcontractors, including Binnings and Barnes, who were engaged for the pile-driving and the electrical work, respectively (Pet. App. 26a; J.A. 46, 56, 7-8). Both Binnings and Barnes were parties to collective bargaining agreements with affiliates of the Union, and the Union had no dispute with them (Pet. App. 27a; J.A. 9).

The East Jefferson Water Works is surrounded by a chain-link fence containing four gates: two on its northern boundary, the eastern one of which is called the "main gate"; and two on its east side, the "warehouse gate" and the "rear gate" (Pet. App. 26a-27a). On October 17, 1963, the Union began picketing at these gates, with signs indicating what "the wage rates on this job should be" (including the rates for pile drivers and electricians), and stating that "Markwell and Hartz, General Contractor, Does Not Have A Signed Agreement With The Building and Construction Trades Council of New Orleans, AFL-CIO" (Pet. App. 27a; J.A. 77, 9).

On October 23, Markwell posted signs at the gates on the northern boundary and the warehouse gate indicating that they were for the use of the subcontractors, suppliers and freight lines making deliveries to the project, and not Markwell's employees; another sign at the rear gate indicated that it was for the use of Markwell's employees (Pet. App. 27a-28a; J.A. 38-39). The signs subsequently were changed so

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tioner (J.A. 16). "J.A." refers to the Joint Appendix in the court below.

that, by November 16, those at the northern gates and the warehouse gate contained the additional statement that Markwell's employees and suppliers, and carriers making deliveries to Markwell, were to use the rear gate only (Pet. App. 28a; J.A. 45-46, 68). Markwell notified the Union of this gate allocation, and also all suppliers and truck lines (Pet. App. 28a; J.A. 45, 68-69). There is no evidence that the gates were used in a manner inconsistent with this posting (Pet. App. 28a). Despite the clear delineation between subcontractors' entrances and exits and the rear gate used by those serving and servicing Markwell, the Union continued to picket the gates other than the rear gate until January 15, 1964, when the Board's Regional Director obtained a temporary injunction from the federal district court, under Section 10(l) of the Act (Pet. App. 27a; J.A. 8-9, 21). During the picketing, the employees of Binnings and Barnes declined to perform work on the project called for by their employers' subcontracts (Pet. App. 27a, 28a; J.A. 22-27, 29, 30-32, 39, 41, 48, 62-63, 65, 67-68, 73).

On the foregoing facts, the Board (with two members dissenting) concluded that, on and after November 16, the Union, by continuing to picket at the gates which had been reserved for the neutral subcontractors and their suppliers, exceeded the bounds of legitimate primary activity directed against Markwell and engaged in a deliberate effort to force Binnings and Barnes, who were secondary employers, to cease doing business with Markwell. Accordingly, the Board held that the Union thereby violated Section 8

(b)(4)(B) of the Act (Pet. App. 35a-39a). The Board ordered the Union to cease and desist from the unfair labor practices found, and to post appropriate notices (Pet. App. 39a-40a). The court of appeals (with one judge dissenting) sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-21a).

ARGUMENT

The decision of the court below is correct and is in accord with the view of the other court of appeals which has considered the same question.[2] There is thus no occasion for review by this Court.

1. In *National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, this Court held that, notwithstanding the close relationship between the general contractor and the various subcontractors on a construction project,[3] each was a neutral in a labor dispute involving the other and was thus entitled to the protection of the Act's secondary boycott provisions (now Section 8(b)(4)(B)). Accord, *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations*

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[2] *National Labor Relations Board* v. *Nashville Bldg. & Constr. Trades Council*, 383 F. 2d 562 (C.A. 6); see also *Orange Belt District Council of Painters No. 48* v. *National Labor Relations Board*, 361 F. 2d 70 (C.A. D.C.).

[3] See the dissenting opinion of Mr. Justice Douglas in *Denver*, 341 U.S. at 692-693. See also *Denver Bldg. & Constr. Trades Council* v. *National Labor Relations Board*, 186 F. 2d 326, 335-337 (C.A. D.C.); *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 181 F. 2d 34, 40-42 (C.A. 2) (dissenting opinion).

Board, 341 U.S. 694. At the same time, however, the Court recognized that the secondary boycott provisions must be administered so as to reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" (341 U.S. at 692).

The line between legitimate primary activity and unlawful secondary activity is relatively easy to draw where the primary and secondary employers have separate work sites.[4] A more difficult problem is presented in the construction project and other "common situs" cases—"situations where two employers were performing separate tasks on common premises" (*Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board (General Electric Corp.)*, 366 U.S. 667, 676-677). However, early in the development of the law under Section 8(b)(4), the Board evolved the *Moore Dry Dock* criteria[5] as aids in de-

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[4] Compare *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672, with *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947.

[5] In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549, where the primary employer's ship was temporarily located at the secondary employer's dock, the Board stated:

> In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on

terming whether picketing at a common situs is primary or secondary. The Board has since applied these criteria in all construction project cases—including situations where, as here, the primary dispute was with the general contractor.[6] Under the *Moore Dry Dock* criteria, the Board was warranted here in finding that the Union's continued picketing at the northern and warehouse gates, after they had been clearly reserved for the exclusive use of the neutral subcontractors and their employees and suppliers, constituted a deliberate effort to implicate those persons in the Union's dispute with Markwell, and hence was secondary activity.

2. Petitioner seeks to distinguish *Denver* on the ground that there the union's dispute was with a non-union subcontractor, whereas here "the objective of the picketing union was to raise the wages of the general contractor's employees to the area standards" (Pet. 21). However, even though petitioner had a primary dispute with Markwell over its failure to conform to area standards, it cannot further that dispute by exerting secondary pressure on the neutral

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the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *

[6] *Local Union No. 55 (PBM)*, 108 NLRB 363, enforced, 218 F. 2d 226 (C.A. 10); *Piezonki* v. *National Labor Relations Board*, 219 F. 2d 879 (C.A. 4); *Eau Claire Bldg. & Constr. Trades Council*, 122 NLRB 1341; *Hermandad de Trabajadores de la Construccion*, 127 NLRB 900.

subcontractors also working on the project. Here the Board found, and the court below agreed, that at least an object of the Union's picketing, on and after November 16, was to force neutrals Binnings and Barnes to cease doing business with Markwell (Pet. App. 7a-8a, 38a-39a).

Petitioner is on no firmer ground in seeking to distinguish *Denver* because here the picketing became unlawful only after the establishment of reserved gates (Pet. 22-23). In *Denver* it was apparent from the outset that the union was not conducting its picketing in a manner calculated to minimize the impact on the neutral contractors at the common situs (see 341 U.S. at 678-679). Here, on the other hand, since the Union picketed with signs which named Markwell as the target of its dispute, there was no basis for attributing a secondary objective to it until Markwell, in an effort further to minimize the impact of the picketing on the neutral subcontractors, reserved special gates for them and their suppliers and the Union continued to picket at those gates, instead of only at the gate reserved for Markwell and its suppliers. In short, that the picketing in *Denver* was secondary from its inception, while here it became secondary only after the establishment of the reserved gates, provides no sound basis for distinguishing the two cases.

3. Petitioner Union further contends that this Court's decision in *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board (General Electric Corp.)*, 366 U.S. 667, qualified or overruled the *Denver* case. That holding, petitioner as-

serts, has imposed an additional requirement before secondary activity can properly be found—*i.e.*, it must be shown that the neutral employer was performing work which was "unrelated" to the normal operation of the primary employer's business. In so urging, we submit, petitioner misconceives the scope of that decision.

In *General Electric*, the union representing the production and maintenance employees at the company's Louisville plant called a strike over contract terms and established picket lines at the various gates of the plant. The company, in addition to receiving deliveries and supplies from neutral employers, as do all manufacturing plants, also had at work on its premises a number of independent contractors who, with their employees, were performing a variety of tasks ranging from construction of new buildings to general maintenance work (366 U.S. at 669). The company, in an effort to minimize the impact of the picketing on these independent contractors, set aside a separate gate exclusively for their use. In these circumstances, this Court rejected the broader contentions of the parties respecting the basis for determining whether the picketing was primary or secondary. It held that the "legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor prac-

tice * * *" (*United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 496-498, explaining the *General Electric* decision).

It is our view that the "related work" concept enunciated in *General Electric* was designed to meet the special problem presented where some of the independent contractors at work on the primary employer's premises are performing work directly connected with his day-to-day operations (*e.g.*, routine maintenance), while others are performing work of a more long-range nature (*e.g.*, capital improvements). Since the "primary strike * * * is aimed at applying economic pressure by halting the day-to-day operations of the struck employer" (*Carrier Corp.*, *supra*, 376 U.S. at 499), the union has a legitimate interest in appealing to the former class of contractors, but not to the latter.

However, in the typical construction project situation there is no need to inquire whether the other contractors are performing work related to the normal operations of the contractor with whom the union has its primary dispute. While the tasks performed by the various crafts on a construction project are related in the sense that they all enter into the construction of the same facility and one often depends upon the completion of the other, under *Denver* the relation is not, as a matter of law, the equivalent of furnishing materials and services needed for the day-to-day operations of a struck plant.[7] Accordingly,

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[7] See Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1425, n. 292 (1962); see also J.A. 29.

the *Moore Dry Dock* criteria remain appropriate guides for determining whether the union's picketing at a construction project is primary or secondary.

In sum, *General Electric* was not intended to overrule or qualify *Denver* or to disturb the Board's prior practice of applying the *Moore Dry Dock* criteria to picketing at the typical construction project. Indeed, the Court in *General Electric* referred to *Denver* at least twice without in any way questioning its continuing vitality (366 U.S. at 672, 679),[8] and reviewed, with apparent approval, the Board's application of the *Moore Dry Dock* criteria to construction project cases (see 366 U.S. at 676-679).

4. Finally, in urging that the "related work" concept of *General Electric* is applicable to the relationship between the contractors on a construction project, petitioner seeks to obtain judicially the overruling of *Denver* which the building trades unions so far have been unable to obtain from Congress. See *National Labor Relations Board* v. *Nashville Bldg. &*

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[8] The dissenting judge in the court below asserted (Pet. App. 15a-16a) that, since the opinion of the Court in *Denver* merely focused on the fact that the various contractors on a construction project were independent legal entities and did not discuss the "*relatedness* of the subcontractor's work to the normal operations of the prime contractor," a reexamination of *Denver* in the light of *General Electric* was warranted. However, this overlooks the fact that the main thrust of the argument of the dissenters in *Denver* was that the work of the contractors on a construction project was so closely related that all of them should be viewed as one primary employer for purposes of Section 8(b)(4) (see note 3, *supra*).

Constr. Trades Council, 383 F. 2d 562, 564 (C.A. 6).[9] In light of this additional consideration, review by this Court of the issue raised by petitioner seems particularly inappropriate.

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[9] In 1954 the Senate Labor Committee reported out a bill which would have, *inter alia*, privileged construction site picketing, but the bill was recommitted (see S. Rep. No. 1211 on S. 2650, 83d Cong., 2d Sess., pp. 10-11). A provision privileging such picketing appeared in the bill reported out by the House Labor Committee in 1959 (H. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess., pp. 22-23, I Legis. Hist. of the LMRDA of 1959, pp. 780-781), but not in the substitute Landrum-Griffin bill adopted by the House. In the Conference Committee, the House and Senate conferees agreed to exempt the construction industry from the ban on "hot cargo" agreements in Section 8(e), but not to overrule *Denver* (see 105 Cong. Rec. 17900, II Legis. Hist. of the LMRDA of 1959, p. 1433 (Senator Kennedy); H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 39, I Legis. Hist. of the LMRDA of 1959, p. 943). However, commitments were made to introduce "common situs" picketing bills at the next session (see II Legis. Hist. of the LMRDA of 1959, pp. 1387, 1434). In 1960, the House again reported out a bill which would have overruled *Denver* (see H. Rep. No. 1556 on H.R. 9070, 86th Cong., 2d Sess., Part 2, pp. 12-13), but it never came to the floor for a vote; nor did the "common situs" bills on which further House hearings were held in 1961 (see Hearings on Construction Site Picketing before the General Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess.). In the current session of Congress, the House has again reported out such a bill, but, as yet, it has not come to the floor for a vote (see H. Rep. No. 227 on H.R. 100, 90th Cong., 1st Sess.).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AS AMICUS CURIAE

WINTHROP A. JOHNS
1120 Tower Building
Washington, D. C. 20005
Attorney for Amicus Curiae

Of Counsel:

REILLY, JOHNS & ZIMMERMAN
1120 Tower Building
Washington, D. C. 20005

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BRIEF IN OPPOSITION OF INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AS AMICUS CURIAE

International Union of District 50, United Mine Workers of America (herein called District 50), pursuant to consent of the parties under Rule 42 of this Court, files this *amicus curiae* brief in opposition to

the petition of the Building and Construction Trades Council of New Orleans, AFL-CIO (herein called Trades Council), for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. INTEREST OF DISTRICT 50

District 50, a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (herein called the Act), at all times material to this litigation was the duly recognized bargaining representative of the employees of Markwell and Hartz, Inc. (herein called Markwell), employed on the construction project involved in this matter—the filtration plant expansion of East Jefferson Water Works District No. 1, Jefferson Parish, Louisiana. Their employment was covered by an agreement between District 50 and Markwell establishing wages, hours and other terms and conditions of employment.

The secondary boycott activities of Trades Council were directed at disrupting the contractual relationship existing between District 50 and Markwell. Therefore, District 50 has a direct interest in this matter. District 50 was permitted, as *amicus curiae,* to participate in the oral argument heard by the National Labor Relations Board (herein called the Board) in the proceedings before it, and to file a brief with and participate in the oral argument before the Fifth Circuit Court of Appeals.

II. REASONS FOR DENYING THE WRIT

District 50, in general, adopts the arguments in opposition to the issuance of the writ set forth in the Board's brief, presenting, in addition, the following:

A. There Is No Conflict

There is no conflict between the circuits on the question presented; to the contrary, there is harmony. The Sixth Circuit, in *N.L.R.B.* v. *Nashville Building and Construction Trades Council,* 383 F.2d 562, had the identical question for review. In that case, the Sixth Circuit, in an unanimous decision issued on October 5, 1967 (two months prior to the decision of the Fifth Circuit sought here to be brought up on writ of certiorari), enforced the Board's order in *Nashville Building and Construction Trades Council (Markwell & Hartz, Inc.),* 164 NLRB No. 50, 65 LRRM 1149. The Board's decision and order in the latter case, which issued on May 2, 1967, was expressly bottomed on the earlier (October 25, 1965) decision and order of the Board in *Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.),* 155 NLRB 319, which decision and order was enforced by the majority of the Fifth Circuit in the instant matter.

The only other circuit to consider a similar question was the District of Columbia Circuit in *Orange Belt District Council of Painters No. 48, AFL-CIO* v. *N.L.R.B.,* 361 F.2d 71 (1966). In that case the court, on the record "as a whole", rejected the union's argument that under the *General Electric* decision of this Court (*Local 761, International Union of Electrical, etc., Workers* v. *N.L.R.B.,* 366 U.S. 667), the "'reserve gate' doctrine" "cannot be applied to invalidate picketing at a common construction site."

B. The Court Below Properly Enforced the Board's Order

Trades Council's argument, in substance, is that this Court's decision in the *General Electric* case *sub-silentio* overruled the earlier decision of the Court in

the *Denver Building Trades* case (*N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675). In the latter case, decided in 1951, the Court upheld the Board's conclusions that, for the purposes of the secondary boycott section of the Act, contractors and subcontractors on a construction site were to be treated as separate employers (341 U.S., at pp. 689-690) and that proscribed conduct to force one such contractor or subcontractor to cease doing business with another at the construction site was prohibited by that section (341 U.S., pp. 687-689). This view of the Act has been consistently adhered to by the Board and the courts.

Trades Council's argument is predicated on the holding in *General Electric* that in a situation like involved there a separate gate may be established to isolate from the disputes of the primary employer only secondary employers whose services are "unconnected to the normal operations of the struck employer" (366 U.S., p. 680). The Trades Council's argument, in effect, is that the operations of each contractor or subcontractor on a construction site are connected to those of the others. But this interrelationship of one contractor to another on a construction site was fully recognized by this Court in *Denver Building Trades* and rejected as justification for not applying the secondary boycott provisions of the Act to disputes at construction sites. Thus, as the Court there (341 U.S., at pp. 689-690) stated:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The

> business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. * * *"

The first point we wish to make is that there is no legal or logical foundation for the Trades Council's argument that *General Electric sub-silentio* overruled *Denver Building Trades.* The *General Electric* case involved the question of whether the primary employer there, a struck manufacturer, could set apart a separate gate for the use of the employees of employers coming to his plant to do business with him in order to isolate them from the consequences of the primary picketing at the plant. In other words, neither the *Denver Building Trades* holding regarding the independent status of contractors and subcontractors on construction sites nor the application of the *Moore Dry Dock* (92 NLRB 547, 549) criteria to common situs picketing—such as a construction site—was presented for review. Rather, what was presented to this Court in *General Electric* in 1961 was whether the traditional right of a union to shut down the entire plant premises of the primary employer to those coming there was in any respect curtailed by the secondary boycott section of the Act. Previously, in *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665 (cited in *General Electric,* 366 U.S., at p. 672), this Court had held on the facts there presented that picketing and other direct activities to close the plant of the primary employer to employees of other employers coming to the primary premises was not prohibited by the secondary boycott section.[1] Thus, if any case was up

[1] The specific question presented in *International Rice Milling* was whether the section banned the union's direct action to restrain the employees of a customer of the plant from crossing the picket line to pick up plant products for their employer (see 341 U.S., pp. 669-670).

for reexamination in *General Electric* it was *International Rice Milling,* not *Denver Building Trades* (see 366 U.S., pp. 674-679).

Moreover, by holding in *General Electric* that the primary employer could establish a separate gate to isolate certain employers and their employees coming to the primary premises from the plant dispute, this Court limited activities by a union at primary premises previously regarded as without limitation. It is indeed anomalous to argue that an interpretation of the Act which limits boycott rights at primary plant premises *sub-silentio* expands such rights at common situs construction sites.

As the Board noted (R. 86), unlike *General Electric,* which involved picketing at the premises of the primary employer, the picketing in the instant case was at the premises of a neutral person (the East Jefferson Water Works) on which the primary employer (Markwell) and others (Binnings and Barnes) were engaged in construction work for the neutral.

What the Trades Council anomalously argues, in effect, is that the *General Electric* case grants a right, not existing before, to the primary employer, at the primary employer's own premises, to isolate certain secondary employers working at the primary premises from the consequences of the primary dispute by the establishment of a separate gate at such primary premises for such secondary employers, but at the same time *sub-silentio* withdraws rights previously existing in employers at common sites similarly to be isolated from the disputes of others at the site,[2] even when the

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[2] See *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market),* 116 NLRB 859-861, enf'd 249 F. 2d 591 (C.A. 9), cited in *General Electric,* 366 U.S., at pp. 678-679.

construction site is at the premises of a neutral as here. There is no foundation in *General Electric* for such an inference.

This Court subsequently in *United Steelworkers* v. *N.L.R.B. (Carrier Corp.)*, 376 U.S. 492, made clear that the *General Electric* decision was restricted to consideration of separate gate picketing at a "primary employer's plant" and to the conditions for its legality. As the Court there stated (at pp. 497-498):

> "The Court [in *General Electric*] accepted neither the approach of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the *primary employer's plant*. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the *employer's plant*, the picketing was an unfair labor practice. * * *" (Emphasis added)

Our next point is, were *General Electric* applicable to a construction site and the standards there set forth for appraising the legality of separate gate picketing at a struck plant deemed to control the legality of separate gate picketing at a construction site, the Board's finding of unlawful picketing in the instant case nonetheless would have to be sustained.

In the first place, the employers whom this Court in *General Electric* held could be isolated from the pri-

mary employer's dispute at the plant were, as here, employers engaged in the construction industry, at least some of whom had direct contracts with the primary employer and were responsible to it for their final product. Also, the work of these employers was not totally "[un]connected with the normal operations of the [primary] employer", or totally "unrelated to the day-to-day operation of the [primary] employer's plant" (*Carrier Corp., supra*). Next week, next month, or next year the construction work being performed was to become part of the plant and part of the "normal" "day-to-day" operation of the primary employer. In the meantime, the Court held, their operations could be segregated from the normal operations of the plant; the only employers who could not be segregated were those contributing to the day-to-day operations of the existing plant, such as those performing pick-up and delivery and maintenance services.

Like the primary employer in *General Electric,* Markwell here contracted out certain construction work to be performed by others and retained some work to be performed by its own employees, as is the practice in the industry. Thereafter, the construction work contracted out became, like in *General Electric,* the work of those to whom it was contracted; what work Markwell retained constituted it normal, day-to-day operations on the construction site under *General Electric.* Under the *General Electric* principle then Markwell, as it did, could establish separate gates to isolate its subcontractors from its dispute as long as employers doing business with it, such as its material men and suppliers, did not violate the separate gates by using them. There is no contention here that there was any such violation of the separate gates after they were fully established.

Our last point is this, were Trades Council correct in its contention, it would mean that *General Electric,* while extending the secondary boycott prohibition to certain picketing and other conduct at primary plant premises, *sub-silentio* eliminated entirely its application to the construction industry. Thus, although a manufacturer with a labor dispute at his plant may isolate construction contractors working at his premises from the consequences of his dispute at the plant, it would mean that were the labor dispute with one of the contractors working at his premises he would be powerless to isolate the other contractors on his premises, and perhaps himself, from such dispute. Also, if a union may lawfully picket a segregated gate at a construction site, it may lawfully appeal directly to the employees of the secondary contractors at the site to honor its picket line; if it may do this, it may lawfully induce a total strike of a construction project to force one contractor thereon to cease doing business with another contractor.

But this *sub-silentio* consequence of the *General Electric* decision, urged by Trades Council—total exemption of the construction industry from the secondary boycott prohibition of the Act—would accomplish the very result which the building trades unions of the AFL-CIO for years unsuccessfully have sought in Congress, and today are still seeking. There is no basis for the argument that this Court, in a case which did not involve the issue, embarked upon such a major revision of the law, denied by Congress, especially without clearly disclosing its intent to do so and explicating its reasons for so doing.

The absence of confidence in the arguments here advanced for certiorari is fully demonstrated by the continued push for Congressional amendment of the Act.

III. CONCLUSION

For the reasons aforesaid, the petition for writ of certiorari should be denied.

Respectfully submitted,

WINTHROP A. JOHNS
1120 Tower Building
Washington, D. C. 20005
Attorney for Amicus Curiae

Of Counsel:

REILLY, JOHNS & ZIMMERMAN
1120 Tower Building
Washington, D. C. 20005

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

LOUIS SHERMAN
LAURENCE J. COHEN
1200 15th Street, N.W.
Washington, D.C. 20005

VICTOR H. HESS
1411 Decatur Street
New Orleans, Louisiana 70116
Attorneys for Petitioner.

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United Steelworkers v. NLRB (Carrier Corp.), 376 U.S. 492 ..... 4, 5, 6

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, et seq.):

Section 8(b)(4) 1

MISCELLANEOUS:

Lesnick, "The Gravamen of the Secondary Boycott," 62 Colum. L.Rev. 1363 4

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REPLY BRIEF FOR PETITIONER

Introduction

In Petitioner's view, several factors make it appropriate to file a reply to the briefs in opposition filed on behalf of the Board and District 50, United Mine Workers, *amicus curiae*. First, the Board's brief has raised the irrelevant issue of the possible effect of various legislative efforts to amend Section 8(b)(4) of the Act on the certworthiness of the issues raised by the Petition. Second, the briefs in opposition have misstated the nature of Petitioner's position concerning this Court's decisions in the *Denver*[1] and

[1] *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675.

General Electric[2] cases. In so doing, the briefs gloss over the sharp division both in the Court below and in the Board concerning the substance of the issues as actually presented by Petitioner.[3] Finally, it is worth noting that even the Board's brief does not deny the importance of the federal question presented by the Petition or the drastic effects of the decisions below on the basic rights of organized labor in the construction industry.

I

The Board's brief in opposition alleges that the Petition herein is an attempt to obtain judicially the overruling of *Denver* which the Building and Construction Trades Department has been unable to obtain from Congress. In the Court below, one-fifth of the Board's Brief was devoted to a prejudicial narrative of efforts made in Congress during the past 13 years to overturn this Court's decision in *Denver*. No legal authorities were cited by the Board, and none is cited here, to indicate why Congressional inaction[4] in this area is entitled to any judicial significance.

The answer to the Board's contention is that, for the reasons set forth in the Petition and hereinafter, *Denver* is distinguishable from the instant case. Accordingly, efforts to overturn that decision in Congress are irrelevant to the instant case, which does not present the same issue. Furthermore, the legal interpretation of a statute is properly based upon its provisions and judicial decisions thereunder rather than legislative history of efforts to amend the law. As this Court stated in *Commissioner of Internal Revenue* v. *Church*, 335 U.S. 632, 650, n. 11, quoting from

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[2] *Local 761, Electrical Workers* v. *NLRB (General Electric)*, 366 U.S. 667.

[3] The Court's attention in this regard is respectively directed to the discussion of the decisions below at pp. 6-10 of the Petition.

[4] It is to be noted that Congress has never registered a negative vote on the proposition of overturning the *Denver* case.

Helvering v. *Hallock*, 309 U.S. 106:

> ". . . we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

A similar attitude was expressed in *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U.S. 373. There the Court reached a result which had been the subject of a prior unsuccessful request for Congressional corrective action. The Court held it "cannot impute to Congress' failure to amend the [ICC Act] the significance which the petitioners contend it should have," because such a conclusion "is at best the product of a set of inferences, none of which is free from doubt."

It is also pertinent to observe that, notwithstanding the emphasis placed upon this argument by the Board below, not one of the three judges saw fit to place any reliance on it.

II

The briefs in opposition of the Board and the *amicus curiae* attribute to Petitioner a position with respect to the *Denver Building Trades* case which has not been advanced by Petitioner. Specifically, both the Board and the *amicus curiae* state that Petitioner seeks, via the Petition, to reverse this Court's decision in *Denver*, and that Petitioner contends that the *General Electric* decision overruled *Denver*. Thus, the brief of the *amicus curiae* refers to the "Trades Council's argument that *General Electric sub silentio* overruled *Denver Building Trades*." (Brief, p. 5.) Similarly, the Board's brief states that ". . . petitioner seeks to obtain judicially the overruling of *Denver* . . ." (Brief, p. 11; see also Board's brief at page 8.)

We assume that this Court will look to Petitioner's own statement of its position, rather than to the assertion of

other parties with respect thereto. To this end, Petitioner respectfully refers the Court to page 20 of the Petition. There, Petitioner's view of the relationship of this case to *Denver* is stated as follows:

> "It is respectfully submitted that a reversal of the Board's decision and order in this case *would not involve a reversal of the decision in Denver.*
>
> "The issues in the *Denver* case are different from the issues in the instant case...." (Emphasis supplied.)

As set forth more fully in the petition, the basic difference between *Denver* and the instant case is that in the former this Court found that the only way in which the Denver Council could accomplish its objective was to force the neutral general contractor to cease doing business with the electrical subcontractor with whom the Council had its dispute. In marked contrast, the New Orleans Council's objective here could have been satisfied if Markwell & Hartz, the general contractor, had raised the wages of its own employees. Thus, the dispute with Markwell & Hartz was strictly primary in nature.[5]

The essence of Petitioner's position concerning the effect of *General Electric* and *Carrier*[6] is that, under those decisions, the *Moore Dry Dock* rules are to be applied only when the work of the employers present at a common situs is unrelated, and that this Court did not intend in *General*

---

[5] The Board's citation, at page 10 of its brief in opposition, of footnote 292 of Professor Lesnick's article, "The Gravamen of the Secondary Boycott," 62 Colum. L. Rev. 1363, 1425, is clearly not pertinent, since that note refers solely to the relationship of two subcontractors working side by side. Actually, Judge Wisdom, in his dissenting opinion below, interpreted Lesnick's rationale as requiring a holding that the picketing in the instant case was lawful and *Denver* distinguishable. (Footnote 13 of dissenting opinion; Pet. App. 16a.)

[6] *United Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492.

Electric[7] and *Carrier* to establish one set of rules to govern common situs picketing at a manufacturing plant and another in the construction industry (Petition, pp. 12-13, 17-19).

The only statement offered by the Board in its brief to justify its unequal application of law is contained at page 10 thereof:

> "It is our view that the 'related work' concept enunciated in *General Electric* was designed to meet the *special problem* presented where some of the independent contractors at work on *the primary employer's premises* are performing work directly connected with his day-to-day operations (e.g., routine maintenance), while others are performing work of a more long-range nature (e.g., capital improvements). . . .
>
> "However, in the typical construction project situation there is no need to inquire whether the other contractors are performing work related to the normal operations of the contractor with whom the union has its primary dispute. While the tasks performed by the various crafts on a construction project are related in the sense that they all enter into the construction of the same facility and one often depends upon the completion of the other, under *Denver* the relation is not, as a matter of law, the equivalent of furnishing materials and services needed for the day-to-day operations of a struck plant." (Emphasis supplied.)

---

[7] The Board's statement of the situation in *General Electric* is imprecise. The Board states, at page 9 of its brief, that, "The company, in an effort to minimize the impact of the picketing on *these* independent contractors, set aside a separate gate exclusively for their use." (Emphasis supplied.) This leaves one with the impression that the gates there were established after the commencement of the picketing which gave rise to the *General Electric* case itself. In point of fact, the gates had been established some four years prior to the specific dispute before the Court in that case. Thus, unlike the instant case, there was no attempt to use the separate gates as a device to convert lawful picketing into unlawful picketing. See further in this regard footnote 9 of the Petition herein, at page 18.

The position just expressed is radically different from that stated to this Court by the Board in its brief in the *General Electric* case:

> "The situation here [GE] is substantially similar to that in *Denver* and *Electrical Workers,* pp. 17-18 supra. There, as here, the premises were the regular work site for a number of different employers and their employees. . . .
>
> "*Denver* and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park." (Board Brief, at page 34.)

The transformation of the Board's view of the manufacturing and construction contexts from indistinguishable to totally disparate is certainly not required by this Court's decisions in *General Electric* or *Carrier.* Moreover, even though the contradiction between the Board's positions before this Court in *General Electric* and in the instant case was clearly stated in the Petition (at pages 13-20), the Board's brief is silent; no explanation or rationalization is offered for this self-contradiction.

III

At pages 24-26 of the petition, the significance of the question presented by the Petition, both in terms of the administration of the National Labor Relations Act and the strangulating effect of the decisions below on the rights of labor organizations in the construction industry, was demonstrated. Included were references to several law review notes, commenting adversely on the harsh and discriminatory effects of the *Markwell & Hartz* doctrine on unions in that industry. It is, therefore, significant that nowhere in the Board's brief in opposition is there a denial of the importance of the question presented by the Petition.

Conclusion

For the foregoing reasons, and those set forth in the Petition for the writ, the Petition should be granted.

Respectfully submitted,

LOUIS SHERMAN
LAURENCE J. COHEN
1200 15th Street, N.W.
Washington, D.C. 20005

VICTOR H. HESS
1411 Decatur Street
New Orleans, Louisiana 70116
Attorneys for Petitioner.

Of Counsel:
SHERMAN AND DUNN
Washington, D.C.

JACKSON & HESS
New Orleans, Louisiana

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